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Filed May 19, 1964

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1179-64

AYAKO HONDA, 1576 Valota Road, Redwood City, California; KANEKICHI MURAKAMI, 450 North 12th West, Salt Lake City, Utah; KANEYO SATO, P. O. Box 242, Ontario, Oregon; TOMI TSUJI, 6828 Beacon Avenue, Seattle 8, Washington; GENSUKE YOSHIDA, 247 W. 72 Street, New York, New York 10023, for themselves and on behalf of all others similarly situated, *Plaintiffs*,

v.

ROBERT F. KENNEDY, Attorney General of the United States, Department of Justice Building, Washington 25, D.C., *Defendant.*

COMPLAINT FOR DECLARATORY AND OTHER RELIEF

1. This Court has jurisdiction under 5 U.S.C. 1009, 28 U.S.C. 1331, 1357, and 2201, and 50 USC Appx. 34f, as amended.

2. Plaintiffs are former depositors in the Yokohama Specie Bank, Ltd., who had assets on deposit in said bank on December 7, 1941. They then held identically-worded yen Certificates of Deposit issued to them in the United States in exchange for the deposit of dollars in said bank, which Certificates were redeemable upon demand in dollars at the offices of the bank in the United States or in yen at the offices of the bank in Japan.

3. Plaintiffs file this action on their own behalf and on behalf of all others similarly situated. The persons so situated, several thousand in number, are so numerous as to make it impracticable to bring them all before the Court, and each of them has an identical claim against the funds

of said bank seized by the United States Government, based upon identical yen deposit certificates, differing only as to date, amount, name of depositor and amount of interest. Hereinafter, unless otherwise stated, the term plaintiffs will be used to describe the entire class on whose behalf this suit is filed.

4. Defendant, Robert F. Kennedy, is the Attorney General of the United States. He is a successor in office to the Alien Property Custodian who on December 7, 1941 seized, and in 1943, pursuant to the Trading with the Enemy Act as amended (50 USC Appx. 34, 620), vested certain properties of the Yokohama Specie Bank, Ltd., including the funds plaintiffs had on deposit therewith. Unless otherwise stated, the term defendant will be used hereinafter to refer to the named defendant and/or his predecessors in office or the Office of Alien Property, as the context may require.

5. Pursuant to the Trading with the Enemy Act, plaintiffs submitted timely debt claims to defendant on account of the seizure of their assets as aforesaid.

6. Defendant thereafter recognized the validity of plaintiffs' claims by written communications in 1958 and 1959. A letter typical of that sent to each of the plaintiffs is attached hereto as Exhibit "A" and by this reference made a part hereof. Defendant, however, proposed to pay at the ratio of 361.55 yen per dollar, rather than return to plaintiffs their money which defendant had seized at the ratio of approximately 4 yen per dollar (23.4 cents per yen), which was the true and accurate ratio of dollars to yen and the appropriate ratio for measuring the dollar value of plaintiffs' holdings and just claims under said Act.

7. Plaintiffs did not, in 1958 and 1959, submit for payment in the proposed reduced amounts, their original certificates, as they were invited to do by the letters of defendant (see Exhibit A), because (a) the proposed amount of payment was legally erroneous, inadequate and arbitrary (representing but 1.18 per cent of their true claim), as hereinabove set forth in paragraph 6; because (b) they were unwilling to surrender at that time their original certificates constituting the physical evidence of their right and claim; because (c) they feared that submission of their

original certificates for payment of the proposed legally erroneous amount would constitute acquiescence in the adequacy and legality thereof, and because (d) many of the plaintiffs were and are old people who could not read English and did not understand the communications of the defendant.

8. The Office of Alien Property had, and has, photostatic copies of each of plaintiffs' Certificates. Such photostatic copies of each of plaintiffs' Certificates were required by said Office as a condition of the timely filing and consideration of the claims of all claimants; the Office of Alien Property at all times had, and has, access to or possession of the books of the Yokohama Specie Bank, Ltd. which showed and show who were and are the holders of the Deposit Certificates, the numbers and amounts thereof; and the said Certificates were and are non-negotiable. It was not necessary, therefore, as a condition of the allowance of the plaintiffs' claims, as distinguished from the payment thereof, that the Office of Alien Property have in hand the original Certificates.

9. Subsequently the defendant dismissed each of the plaintiffs' debt claims for failure to file original Certificates, as requested in the communications from defendant to plaintiffs, an example of which is attached hereto as Exhibit A.

10. Pursuant to Section 34f of the Trading with the Enemy Act as amended (50 USC appx. 34f), on May 11, 1961, defendant published a schedule of claims proposed to be paid from assets of the Yokohama Specie Bank, Ltd., none of which included plaintiffs' claims. Thereafter, beginning about August 1, 1961, he began to mail said schedules to the various debt claimants. On August 13, 1961, a class suit on behalf of persons thus scheduled for payments was filed in this Court in the case of *Abe* v. *Kennedy*, Civil Action Number 2529-61, to test the adequacy of the proposed yen-dollar ratio under said schedule, which constituted the same issue then existing between plaintiffs herein and defendant. Plaintiffs were not included among the class on whose behalf said suit was filed.

11. On or about April 27, 1964 the *Abe* suit was settled

by an order of this Court awarding payment to the plaintiffs therein of the principal of their claims at a ratio of approximately 23 cents per yen. Said settlement did not exhaust the amount of money held by defendant and defendant still holds funds in sufficient amount to pay plaintiffs on the same basis as said settlement. On information and belief, plaintiffs allege that the present administrative policy of defendant is to pay all valid claims based upon seizure of the assets in the Yokohama Specie Bank, Ltd., in the ratio of approximately 23 cents per yen.

12. Plaintiffs, as set forth above in paragraph 6, have proved to the satisfaction of the defendant that they hold valid debt claims on account of the seizure of their assets in the Yokohama Specie Bank, Ltd. Plaintiffs allege on information and belief, that nevertheless defendant declines to pay the just debt claims of plaintiffs solely because original certificates were not by them submitted to defendant in 1958 and 1959, as above set forth in paragraph 7.

13. The requirement imposed by defendant for the submission of original certificates as a prerequisite to award of the proposed legally inadequate and erroneous amount, was arbitrary and unauthorized. Defendant now recognizes by virtue of the conversion rate by him employed, as set forth in paragraph 11 above, the error of his previously proposed conversion ratio. Refusal now to pay plaintiffs' valid debt claims solely for their failure to comply with the defendant's previous arbitrary and unauthorized demand for original certificates, as aforesaid, is injurious, inequitable, contrary to the statutory rights of plaintiffs and deprives them of property without due process of law.

14. Plaintiffs were and are ready, willing and able to surrender their original Certificates as a condition of receiving award or payment of their claims on the conversion formula set forth in paragraph 11 above, at such time as requested, noticed or ordered to do so by the defendant or by this Court.

WHEREFORE, plaintiffs pray that the Court declare their rights herein, specifically their right not to have their debt claims rejected on account of the unlawful requirement earlier imposed for submission of original certificates; that

they be paid in the same conversion ratio as plaintiffs in *Abe* v. *Kennedy*, No. 2529-61, and for other appropriate relief.

JOSEPH L. RAUH, JR.,
JOHN SHARD,
1625 K Street, N.W.,
Washington 6, D.C.

A. L. WIRIN,
FRED OKRAND,
257 South Spring Street,
Los Angeles 12, California.

MARSHALL ROSS,
139 South Beverly Drive,
Beverly Hills, California,
Attorneys for Plaintiffs.

EXHIBIT A

REGISTERED MAIL
RETURN RECEIPT REQUESTED

Ayako Honda
1576 Valota Road
Redwood City, California

Dear Sir:

Reference is made to the above-numbered debt claim which has been filed with this Office with respect to the insolvent account of the Yokohama Specie Bank, Ltd. The claim is based upon yen certificates of deposit.

The Director of this Office decided on November 13, 1957, *In the Matter of Kunio Abe, et al.*, Claim No. 55507, Docket No. 55 D 72, which decision the Attorney General has declined to review, that yen certificates of deposit issued by the Yokohama Specie Bank, Ltd., and the Sumitomo Bank, Ltd. are obligations payable in yen in Japan, and that claims based on such certificates of deposit are to be allowed and paid in United States currency at the post war rate of exchange in accordance with the "Judgment Day" rule set forth in *Deutsche Bank* v. *Humphrey*, 272 U.S. 517 (1926). Thus, the current rate of exchange of 361.55 yen to one dollar must be used in converting the yen into a dollar amount. Interest is allowable from the date of deposit to the date of payment.

Therefore, if you submit your original certificates of deposit to this Office, I can recommend your claim for allowance in the sum of $9.09 plus interest. If you have lost your certificates, you should prepare a statement setting out that the deposits were made as alleged in the Notice of Claim form, giving the numbers of the certificates, the dates of the deposits, and the branch of the Bank at which the certificates were purchased. You should also state that you have not received payment from the Bank or accepted renewed certificates of deposit. This statement should be signed and sworn to by you before a Notary Public and forwarded to this Office in support of your claim.

Payment of your claim, however, will not be made immediately. Under the procedures set forth in section 34(f) of the Trading with the Enemy Act, as amended (50 U.S.C. App. 34(f)), it is necessary that all of the approximately 9000 claims filed against the Yokohama Specie Bank, Ltd. be reviewed and a schedule issued showing the proposed payments before any payments can be made. Within sixty days after the issuance of the schedule, any aggrieved claimant may file in the District Court of the United States for the District of Columbia a complaint for review of such schedule, naming the Attorney General as defendant. If no complaint for review is filed, payments will be made in accordance with the schedule.

Advice received by this Office is to the effect that yen certificate of deposit accounts are carried on the books of the Yokohama Specie Bank, Ltd. in Japan, and the funds may be withdrawn in that country or transferred to the Bank of Tokyo, Ltd. Under the circumstances, you may with to utilize the funds in Japan rather than await settlement by this Office. If this is done, the Notice of Claim filed with this Office should be canceled by signing and mailing the enclosed Notice of Cancellation of Claim card.

If, however, you wish to maintain your claim with this Office you are requested to submit the original certificates of deposit or the notarized statement as to why they cannot be forwarded. In the event you object to the allowance of your claim in the amount stated above, you should submit the certificates to this Office within the next forty-five days and file a statement specifying your objections, together with the reasons in support thereof. Upon receipt of your objections, if I consider them to be without merit, I shall apply to the Director of this Office, pursuant to section 502.25(1) of the Rules of Procedure for Claims, a copy of which is enclosed, for the entry of an Order allowing your claim in the principal amount stated above, plus interest, and dismissing any portion over and above that amount on the ground that there is no debt due and owing to you by the Yokohama Specie Bank, Ltd. in excess of that amount. In acting upon my application, the Director will consider the statement of objections that you may have submitted.

On the other hand, if within the next forty-five days you do not submit the original certificates of deposit or a statement explaining why they cannot be forwarded, I shall conclude that the claim has been abandoned in its entirety and, without further notice to you, shall apply to the Director for the entry of an Order dismissing the claim on the ground of abandonment, pursuant to section 502.25(g) and (i) of the Rules of Procedure for Claims.

To recapitulate:

1. If you wish to maintain your claim with this Office, you should within forty-five days forward the original certificates of deposit and, if you wish to do so, file a statement of your objections to the allowance of the claim in the amount stated above.

2. If you wish to maintain your claim but do not have the original certificates of deposit, you should within forty-five days submit a statement, signed and sworn to before a Notary Public, giving the details of the deposits and stating that you have not received payment or renewed certificates. If you wish to do so, you may also file a statement of your objections to the allowance of the claim in the amount stated.

3. I shall then apply to the Director for an Order allowing your claim in the principal amount stated above, plus interest, and dismissing any portion over and above that amount. Where objections have been filed, they will be submitted to the Director for his consideration in acting upon your claim.

4. If, within forty-five days, you do not submit the original certificates of deposit or an explanation as to why you cannot forward them, I shall conclude that the claim has been abandoned and shall apply to the Director for an Order dismissing the claim on that ground.

5. If you prefer to utilize the funds in Japan, you should sign and mail the enclosed Notice of Cancellation of Claim card in order to clear the records of this Office.

Please note that the original certificates must be submitted; photostatic copies cannot be substituted.

Sincerely yours,

ARTHUR R. SCHOR,
Chief, Claims Section,
Office of Alien Property.

Enclosures

cc: Wirin, Rissman & Okrand,
257 South Spring Street,
Los Angeles 12, California.

Filed January 8, 1965

AFFIDAVIT OF KYUJI HOZAKI

STATE OF CALIFORNIA,
County of Los Angeles, ss:

I, KYUJI HOZAKI, being first duly sworn, depose and say:

My wife, Haruyo, and I were both born in Japan, she in 1896, I in 1897. Neither of us can read English. We are both now United States citizens, becoming such as soon as we were able, after the law was changed.

My claim with the Office of Alien Property for the return of the money I deposited with the Yokohama Specie Bank befor- the war is number 47812 and my wife's is number 47680.

While I don't remember the details, I do remember our receiving a letter or letters from the Office of Alien Property, which I believe were read to us, offering to pay us a ridiculous fraction of the amount of money we had deposited and asking us to send in our original certificates. I believed the purpose of the letter was that if we were agreeable to accepting the small amount we should send in the originals, but I did not understand this to be final nor to mean that if we did not accept, we would get nothing. I thought that there would be more proceedings.

I recall we received notices that our claims were dismissed, but, again I believed that a law suit which I had heard was filed in Washington, D.C. was for all yen claimants and would protect us all. I could not believe that in the end the Government would try to keep from us the money we had deposited.

The moneys we had deposited with the Yokohama Specie Bank along with that we deposited in the Sumitomo Bank which, I understand, is completely lost because the Government has paid all the money it seized from that bank, a total of about $2,000.00, represented, save for a deposit of about $400.00 with the Security-First National Bank, all the life savings we had. When we were evacuated I was forced to sell my barber shop for $200.00 which after the

evacuation I bought back for $2,500.00 which I borrowed in order to be able to do. I received about $[illegible],000.00 for my evacuation claim, but am out the difference.

Of my three sons, two served in the United States armed forces during World War II. My son, Toshio, was killed in Italy on April 5, 1945 while serving in the 442nd Regimental Combat Team. My other son, Teruo, also served in Europe. He was in a hospital in Germany when the war stopped. He was then sent back to the United States to a New Mexico Army Hospital and then to a veterans hospital in San Fernando Valley, California. He died of tuberculosis on June 16, 1946.

/s/ KYUJI HOZAKI.

Subscribed and sworn to before me this 19th day of November 1964.

/s/ K. MUKAEDA.
Notary Public in and for said County and State.

Filed January 8, 1965

AFFIDAVIT OF JIRO KAI

STATE OF CALIFORNIA,
County of Los Angeles, ss:

I, JIRO KAI, being first duly sworn, depose and say:

I am Japanese and understand English with great difficulty. I was born in Japan in 1883 and came to the United States in 1905. I have four children born in the United States. My two sons have served in the United States Army. James went into the service as a private in 1941 and was an officer when he left in 1946 or 1947. He served in the South Pacific and in Japan. Smiley served in Japan after the war.

I have a small claim (#12847) with the Office of Alien Property for the return of the money (about $20.00) I deposited with the Yokohama Specie Bank before the war, which was seized by the United States Government but has not been returned to me.

When I sent in my claim, I did so myself and with it I sent a picture of my certificate.

I did receive a letter from the Office of Alien Property offering me about 30¢ for my claim. I think I recall being asked to send in my original certificate by registered mail to receive this amount. For me to have done this would have cost more than I was being offered. I had heard from others that many more persons had claims similar to mine and I understood that they were all being processed together. I saw in the Japanese newspaper that a court suit was or would be filed seeking to obtain for the yen claimants the proper amount for their claims. I believed, therefore, I would be protected. With the small amount of my claim, I do not see how I could go to court myself, but at no time did I, nor did I intend to, give up my right to receive my money back.

/s/ JIRO KAI.

Subscribed and sworn to before me this 21st day of Novembe 1964

/s/ K. Mukaeda,
Notary Public in and for said County and State.

Filed January 8, 1965

AFFIDAVIT OF SHIGEO KUMASHIRO

STATE OF CALIFORNIA,
County of Los Angeles, ss:

I, SHIGEO KUMASHIRO, being first duly sworn, depose and say:

I was born in Japan in 1903 and came to the United States in 1921. I went about half way through middle (high) school in Japan.

I do not feel confident about being able to read English and so this affidavit is being translated to me before I sign it. Also, my conference with Mr. Okrand, who prepared this affidavit, was with the aid of an interpreter.

Before World War II broke out, I was living with my family in Auburn, Washington, doing truck farming. We are all persons of Japanese ancestry; my wife was born in Japan; all my children—three girls and a boy—were born in the United States. I became a citizen of the United States as soon as I could after the law was changed allowing Japanese aliens to become citizens.

My son, Howard, served with the United States Army in Korea during the early 1950s, was wounded there and awarded the Purple Heart.

Before the war I had left a small amount of money with the Yokohama Specie Bank in Seattle, Washington amounting to almost $60.00. I have filed a claim (#49706) with the Office of Alien Property for the return of this money, but have not received it, I being among those to whom the Government has refused payment on the ground that I did not sent in my original certificate of deposit when asked to do so in 1958 or 1959, although the Government has a photostatic copy of my certificate which I sent along with my claim form or shortly thereafter.

I do recall receiving a letter from the Office of Alien Property. It was very confusing to me. The letter said that the Government recognized my claim as a proper one, but only offered to return to me a few cents, something like 70 or so cents, and that to get this money I was to send in my original certificate. I did not understand that if I did

not send in the certificate I would get nothing and it would cost me almost as much as I was being offered to send the letter by registered mail.

I had understood that there were other and larger claims which had or would be filing a law suit in Washington for the recovery of a proper amount and I believed that such a suit would protect me if the Government were to pay to those persons a larger, more fair amount.

As a Japanese, I was evacuated during the War and had to leave my farming equipment behind. I did get paid for part of my loss when I filed an Evacuation Claim, but not the full amount. When I received the letter about taking such a small amount for my Yokohama Specie Bank deposit, I did not think it fair that I should be expected to take such a loss on my own money which the Government had seized.

/s/ SHIGEO KUMASHIRO.

Subscribed and sworn to before me this 18th day of November 1964

/s/ K. Mukaeda,
Notary Public in and for said County and State.

Filed January 8, 1965

AFFIDAVIT OF MICHIKO TERAO

STATE OF CALIFORNIA,
County of Los Angeles, ss:

I, MICHIKO TERAO, being first duly sworn, depose and say:

My maiden name was Michiko Hamada which is the name under which my claim number 51213 was filed with the Office of Alien Property for return of my money which was taken when the assets of the Yokohama Specie Bank were seized by the United States Government during World War II. I am one of the persons whose money the Government seeks to keep because I did not send in my original certificate of deposit although I at no time have been offered to be repaid the money I deposited with the bank and which the Government took and has.

The amount of my claim is a small one, being about 220 yen. I deposited the money with the bank in 1940 from earnings I had made from working. I was born in Long Beach, California in 1918 and when I went to work, tried to save what I could.

I married my husband, Kakuo Terao, in November, 1941. At that time my husband was in the United States Army. He is also of Japanese ancestry.

After World War II broke out, I, along with all persons of Japanese ancestry, was faced with evacuation from our home near Compton, California where my father was a farmer. My parents, with whom I was living, left before before being put in a camp and we went to Colorado where we all worked share cropping. We were not able to take all our things, just those things like bedding and personal papers and belongings which we were able to load on my father's small truck.

While we were in Colorado, my husband was sent overseas with the Army and was enroute to join the 442nd Regimental Combat Team. While he was in France, he was wounded in the spine so as to make him paralyzed from the waist down, in which condition he now and permanently

is. My husband also had served in the Pacific Theater of Operations. He was awarded the Purple Heart.

After my parents and I had returned to California after the war, I read in some newspaper about filing a claim for the return of the money I had deposited in the Yokohama Specie Bank. This was about 1947, I believe. It had been a long time, but I believe that I had accompanied my claim form with photostatic copies of my two certificates, one for 106.93 yen and the other for 113.16 yen or I later sent in such copies. In any event, I feel sure that the Office of Alien Propery had and has copies of my certificates. I knew that my claim was one of many that were being processed.

I recall receiving in about 1959, although I cannot remember the exact time and I cannot find the papers, a letter from the Office of Alien Property recognizing my claim as being a valid one, but offering to return not the amount of money I had deposited which I believe was around $50.00, but a very, very small amount, something like 60 or 70 cents. I did not believe that the amount offered was a fair one and I did not want to accept such a small amount. In trying to remember what the letter said, I do recall that I was asked to send in my original deposit certificates. It simply did not pay for me to do that. The offer, as I say, was about 60 or 70 cents, it would cost me that amount or more for photostating so that I would have copies of my certificates, plus the cost of registered mail and the regular mail would all add up to more than I would receive.

And so I did not send in my certificate, but at no time did I abandon my claim. I could not afford, in the light of even the full amount of my claim to do anything about it, but I expected that there would be further proceedings. I had heard that all of the claims were being treated as a class and I had heard that some kind of a law suit had been filed or would be filed in Washington, D.C. which I understood would, if successful, protect my right to receive my money back.

I cannot remember the exact sequence of events or even all the papers or notices I received, but I do know that I could do nothing about it because of the small amount of

money involved. However, the matter had been going on for many years and I fully expected that if recovery was allowed for others, it would also be allowed for me. I never intended to abandon my claim nor to let the Government keep my money.

/s/ MICHIKO TERAO.

Subscribed and sworn to before me this 25th day of November 1964

/s/ K. Mukaeda,
Notary Public in and for said County and State.

Filed January 13, 1965

AFFIDAVIT OF KATSUMA MUKAEDA

STATE OF CALIFORNIA,
County of Los Angeles, ss:

I, KATSUMA MUKAEDA, being first duly sworn, depose and say:

I am a person of Japanese ancestry. I was born in Japan in 1890 and have lived in the United States since 1908. I became a citizen of the United States on May 22, 1953, as soon as the law was changed and I was permitted to become a citizen. During all my life in the United States I have lived and worked in the Japanese community.

I have worked as interpreter and scrivener for Japanese persons who could not, at all or well, read or write English. I have assisted and worked with persons in the Japanese community in connection with a number of matters arising out of the fact that they were Japanese aliens in this country or because they were simply Japanese. For example, I have worked with Japanese persons in connection with their claims under the Japanese Evacuation Claims Act and in immigration matters.

I am the current president of the Japanese Chamber of Commerce of Southern California, the Executive Secretary of the Japan-America Society and I am an interpreter in the courts of Los Angeles County to translate from Japanese to English and from English to Japanese.

I have talked, both here in Los Angeles, as well as in San Francisco, California and in Honolulu, Hawaii, with many Japanese persons who are yen deposit claimants with the Yokohama Specie Bank concerning their failure to have sent in their original deposit certificates in 1958 and 1959 when the Office of Alien Property asked that the original certificates be sent in and their failure to file a law suit with regard to their claims. Also, I have general knowledge, based upon my experience in and as a part of the Japanese community, as to the feelings, fears and apprehensions which were felt when the original certificates were called

for and when the claims were denied. Based upon these conversations and experience, I say, on information and belief:

Many of the Yokohama Specie Bank yen deposit certificate holders were old people who could not read English and could not understand the communications they received from the Office of Alien Property; many of them had to rely upon other persons who themselves were not able to understand the letters; most of the claimants had never talked to a lawyer about their cases and there was a general feeling in the community that all of the claims were going to be treated alike, both the Sumitomo Bank claimants and the Yokohama Specie Bank claimants; there was knowledge in the community that a law suit had been filed in Washington and it was understood and believed that the outcome of that law suit would determine how much money the claimants received and that it would apply to all claimants not just some; most of the claimants had had experience with or had heard about the Japanese Evacuation Claims program (50 USC Appx. 1981-1987) and many of them knew generally that under that program, deadlines had been extended and even that the law itself had been changed to include persons who originally were not eligible, to be eligible for repayment of some of their losses due to the Japanese evacuation program, and that persons who previously had been denied payment, later were paid; the claimants are all persons of Japanese ancestry and so, of course, were evacuated from their homes, farms and businesses during the War solely by reason of that fact; that experience left an impact on the claimants with regard to the treatment of them by the Government; I am not a psychologist and so I cannot say what the psychological effects were, but that there were effects, I have no doubt; since the original certificates of deposit were the claimants' only direct evidence of their claim, many of the claimants were reluctant to part with this evidence, especially at a time when the Government was recognizing their claims at less than 2% of their face value, to say nothing of accumulated interest over the years; moreover, many of them felt that to send in their certificates at that time would be taken

as agreeing to accept this very small sum in full settlement and they did not want to do that; there were others whose claims were so small that to send in the originals at the figure the Government was offering would net them no return or a very small amount; as individuals, even those claimants who did not have very small claims could not afford to hire an individual lawyer in Washington or to file their own suit but had to rely on what was being done generally and many of them believed that in the end their Government would not try to keep their money but would return it.

/s/ KATSUMA MUKAEDA.

Subscribed and sworn to before me this 12th day of January 1965.

/s/ J. B. Tietz,
Notary Public in and for said County and State.

Filed September 4, 1964

ANSWER

Defendant, for his answer to the Complaint:

I. Denies each and every allegation of paragraph 1 of the complaint.

II. Denies the allegation of paragraph 2 of the complaint that the plaintiffs' certificates of deposit were redeemable upon demand in dollars at the offices of the Yokohama Specie Bank Ltd. in the United States, but except as thus expressly denied, admits the allegations of paragraph 2 of the complaint.

III. Admits the allegation of paragraph 3 of the complaint.

IV. Denies the allegation of paragraph 4 of the complaint that the vested property of the Yokohama Specie Bank Ltd. in the United States included funds that the plaintiffs had on deposit there but except as thus expressly denied admits the allegations of paragraph 4 of the complaint.

V. Admits the allegations of paragraph 5 of the complaint.

VI. Denies each and every allegation of paragraph 6 of the complaint.

VII. Denies the allegation of paragraph 7 of the complaint that the proposed payment at the ratio of 361.66 yen per dollar was legally erroneous, inadequate and arbitrary but except as thus expressly denied, denies any knowledge or information sufficient to form a belief as to each and every allegation of paragraph 7 of the complaint.

VIII. Denies each and every allegation of paragraph 8 of the complaint.

IX. Admits the allegations of paragraph 9 of the complaint, except that defendant denies that Claim No. 17796 of plaintiff, Gensuke Yoshida, was dismissed by defendant but asserts that it was withdrawn by Genuske Yoshida by Notice of Cancellation card, dated December 1, 1958; and defendant asserts that there are others in plaintiff Yoshida's situation.

X. Admits the allegations of paragraph 10 of the complaint.

XI. Admits the allegations of paragraph 11 of the complaint, except for the concluding sentence of paragraph 11, the allegations of which are denied.

XII. Denies each and every allegation of paragraph 12 of the complaint.

XIII. Denies each and every allegation of paragraph 13 of the complaint.

XIV. Denies any knowldege or information sufficient to form a belief as to each and every allegation of paragraph 14 of the complaint.

WHEREFORE, defendant demands judgment dismissing the complaint.

JOHN W. DOUGLAS,
Assistant Attorney General,
Civil Division.

ANTHONY L. MONDELLO,
ARMAND B. DUBOIS,
Attorneys for Defendant,
Department of Justice,
Offices of Alien Property.

Filed December 29, 1964

DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

Defendant moves to dismiss the complaint on the ground that the Court lacks jurisdiction over the subject matter of this action because it was not commenced within the time set forth in Section 34(f) of the Trading with the Enemy Act, as amended (50 U.S.C. App. 34(f)).

/s/ JOHN W. DOUGLAS,
Assistant Attorney General.

/s /ANTHONY L. MONDELLO,
/s/ ARMAND B. DUBOIS,
Attorneys for Defendant.

Form AMC-1C
September 1946

Form approved.
Budget Bureau No. 61-R037.

UNITED STATES OF AMERICA
OFFICE OF ALIEN PROPERTY CUSTODIAN
WASHINGTON 25, D. C.

DO NOT WRITE IN THIS SPACE
Claim No. 49102
V. O. No(s). 1571
Issued
Effective
Account Nos. 23492

NOTICE OF CLAIM FOR PAYMENT OF DEBT

(Please read the instructions before filling out the form)

1. Claimant's name Kaisuke Muratani
(Person who now owns the claim, not an agent or attorney)

Have you already filed notice of claim for this debt? Yes ☐ No ☑ (*Check one*). If yes, give claim No. ____

2. Agent for service of notice (if any) —
(Person to whom notices and letters should be sent)

Address for service of notice 102 W. 1st So. Salt Lake City, Utah
(If you have no agent, give your own mailing address)

3. Identification of debtor and property:

(a) Name of debtor Yokohama Specie Bank LTD
(Person who owes the debt you want paid)

(b) Identification of property of debtor taken by Custodian:
Vesting Order(s) No. ____

Brief description Deposits at the Yokohama Specie Bank
(In general terms, as "100 shares X corporation common stock," "deposit at X Bank," "real estate in X city.")

(c) Supplemental identification:
(See Instruction D (2). If you are not able to supply information called for by both (a) and (b) of this item, state in a supplement to this item any further information that will assist the Custodian in determining whether he holds any property available for payment of claims against the debtor named; for example, other names including trade names or corporate names under which the debtor did business or kept his property, the addresses or addresses of the debtor, any property of this debtor that you know exists in the United States.)

4. Amount claimed (fill out each line; if inapplicable, write "none").

(a) Principal (State the original amount of the debt without interest. If the amount is unliquidated, state the amount you claim)		$ 3838.23 2,692.75
(b) Additions other than interest (Penalties, protest fees, etc.)		$ None
(c) Total before deductions		$ 6520.98
(d) Payments on account	$ None	
(e) Other deductions (Indicate nature)	$	
(f) Total deductions		$ None
(g) Net amount claimed, without interest		$ 6520.98

(h) Do you claim interest? Yes ☑ No ☐ (*Check one*).

If yes, give rate, period, and amount, as follows:

3 3 percent, from May 27, 1941 (Day, month, year) to October 31, 1945 (Day, month, year) totaling $ 2,189.72

5. Nature of debt Bank deposits (2)
(In general terms, as "bank deposit," "merchandise supplied," "promissory note," "damages for contract not performed," "refund on steamship ticket.")

6. Date debt arose 7th (Day) December (Month) 1941 (Year)

7. Security you now hold, if any ____
(In general terms, as "mortgage of real estate," "pledge of stock certificates." If debt is not secured, state "not secured." If property securing your debt has been taken by the Custodian, see Instruction A.)

8. Priority claimed, if any (see sec. 34 (g) of the Act, reprinted on the instruction sheet).

Wages and salaries (sec. 34 (g) (1))	$
Claims of United States (sec. 34 (g) (2))	
Services, rent, goods, etc. (sec. 34 (g) (3))	
None	

16—68510-1

9. Details of debt.

(State here the specific facts upon which you base the statements made in items 4, 5, 6, 7, and 8. Attach copies of any contracts, notes, or other documents upon which you rely to prove the amount, date, nature, and any security status or priority status of the debt.)

Debt(s) arose due to the freezing of the Yokohama Specie Bank Ltd. accounts (Have 2 deposits with the bank with the certificate numbers of 83115 & 84746

10. Defenses and counterclaims _____
(Here state in general terms the basis of any defense or counterclaim which the debtor has alleged, and its amount)

11. Questions for individual claimants (corporations do not answer).

Citizenship Japanese
(State name of country; if you have no citizenship, write "stateless")

Present residence address 102 W. 1st South Salt Lake City Utah
(Number) (Street) (City) (State)

Since September 1942
(Date when you began residing at this address)

(If you have resided at any other addresses at any time since December 7, 1941, state them all, with the dates of residence, at each address, in a supplement to this item.)

12. Questions for corporate claimants (individuals do not answer).

State in which incorporated _____ Date of incorporation _____

Principal office _____
(Number) (Street) (City) (State)

13. Additional questions for assignees, legal representatives, and successors in interest. (Do not answer these questions if you are the original creditor. Answer them only if you are filing a claim which originally belonged to someone else, and which you have acquired by assignment, by operation of law, or otherwise.)

(a) Original creditor's name _____

(b) Original creditor's address on date debt arose (see item 6) _____

(c) Latest date when original creditor held debt _____
(Day) (Month) (Year)

(d) If original creditor was an individual or a group of individuals, including a partnership, was he (they) a citizen of the United States or the Philippine Islands at all times he (they) held the claim? Yes ☐ No ☐ (*Check one*). If no, give country (countries) and dates of other citizenship _____

(e) If original creditor was an individual or a group of individuals, including a partnership, was he (they) a resident of the United States at all times he (they) held the claim? Yes ☐ No ☐ (*Check one*). If no, give country (countries) and dates of other residence _____

(f) If original creditor was a corporation, give State (or foreign country if not within the United States) and date of incorporation _____
(State or country)

Date of incorporation _____
(Day) (Month) (Year)

(g) Did you acquire the debt directly from the original creditor? Yes ☐ No ☐ (*Check one*). If no, use a supplement to answer questions (a) to (f) of this item, inclusive, for every other person who held the debt prior to your acquisition of it.

(h) How did you acquire the debt? _____
(In general terms, as "assignee," "heir," "executor," "reorganization of corporation," etc. Use a supplement to state details, and supply copies of documents relied on to establish your present ownership of the debt. If any such documents are court orders, the copy attached to the "original" of this form should be certified by the court or other competent official.)

(i) Are you the sole beneficial owner of the claim? Yes ☐ No ☐ (*Check one*). If no, name the other owners and state nature of their interest _____

14. If there are any other facts of which you wish to advise the Custodian, state them in a supplement to this item.

Fees of attorneys, agents, and representatives:

Name of attorney, agent, or representative	*Address*	*Amount of fee*
		$
		$

(Enter the name of each person (or firm) who has received or is to receive any fee for representing you in this claim. If there is no such person, write "none." If the amount of the total fee has been fixed, state it. If it has not, write "unknown," but the amount will have to be supplied before any payment of your claim can be made. Attorneys may submit detailed schedules of services performed and will be required to do so in appropriate cases. See section 30 of the Trading With the Enemy Act, on the instruction sheet.)

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16. I, the undersigned, swear to (or affirm) the following:

(a) **(Strike out the statement that does not apply.)**

I am the claimant named in item 1.
~~I am an officer of the claimant corporation holding the position of~~ _____

(b) The statements made in this notice of claim and in all supplements attached to it are known to me to be true, except as noted to be "upon information and belief."

(c) ~~I have no knowledge of any fact called for by this notice of claim (including the instructions) which is not fully set forth.~~

Kaneki[illegible] Murakami
(Signature)

KANEKICHI MURAKAMI
(Name of signer)—(Please print or typewrite)

NOTE.—It is a criminal offense to make a willfully false statement or representation to any department or agency of the United States Government. U. S. Code, Title 18, sec. 80.

16—45260-1 U.S. GOVERNMENT PRINTING OFFICE

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ABD:DRW:11
Claim No. 49102

July 29, 1959

REGISTERED MAIL
RETURN RECEIPT REQUESTED

Mr. Kanekichi Murakami,
450 No. 12th West,
Salt Lake City, Utah.

Dear Mr. Murakami:

Reference is made to the above-numbered debt claim which has been filed with this Office with respect to the insolvent account of the Yokohama Specie Bank, Ltd. The claim is based upon yen certificates of deposit.

The Director of this Office decided on November 13, 1957, *In the Matter of Kunio Abe, et al.*, Claim No. 55507, Docket No. 55 D 72, which decision the Attorney General has declined to review, that yen certificates of deposit issued by the Yokohama Specie Bank, Ltd. and the Sumitomo Bank, Ltd. are obligations payable in yen in Japan, and that claims based on such certificates of deposit are to be allowed and paid in United States currency at the post war rate of exchange in accordance with the "Judgment Day" rule set forth in *Deutsche Bank* v. *Humphrey*, 272 U.S. 517 (1926). Thus, the current rate of exchange of 361.55 yen to one dollar must be used in converting the yen into a dollar amount. Interest is allowable from the date of deposit to the date of payment.

Therefore, if you submit your original certificates of deposit to this Office, I can recommend your claim for allowance in the sum of $18.03 plus interest. If you have lost your certificates, you should prepare a statement setting out that the deposits were made as alleged in the Notice of Claim form, giving the numbers of the certificates, the dates of the deposits, and the branch of the Bank at which the certificates were purchase. You should also state that you have not received payment from the Bank or accepted renewed certificates of deposit. This statement should be

signed and sworn to by you before a Notary Public and forwarded to this Office in support of your claim.

Payment of your claim, however, will not be made immediately. Under the procedures set forth in section 34(f) of the Trading with the Enemy Act, as amended (50 U.S.C. App. 34(f)), it is necessary that all of the approximately 9000 claims filed against the Yokohama Specie Bank, Ltd. be reviewed and a schedule issued showing the proposed payments before any payments can be made. Within sixty days after the issuance of the schedule, any aggrieved claimant my file in the District Court of the United States for the District of Columbia a complaint for review of such schedule, naming the Attorney General as defendant. If no complaint for review is filed, payments will be made in accordance with the schedule.

Advice received by this Office is to the effect that yen certificate of deposit accounts are carried on the books of the Yokohama Specie Bank, Ltd. in Japan, and the funds may be withdrawn in that country or transferred to the Bank of Tokyo, Ltd. Under the circumstances, you may wish to utilize the funds in Japan rather than await settlement by this Office. If this is done, the Notice of Claim filed with this Office should be canceled by signing and mailing the enclosed Notice of Cancellation of Claim card.

If, however, you wish to maintain your claim with this Office you are requested to submit the original certificates of deposit or the notarized statement as to why they cannot be forwarded. In the event you object to the allowance of your claim in the amount stated above, you should submit the certificates to this Office within the next forty-five days and file a statement specifying your objections, together with the reasons in support thereof. Upon receipt of your objections, if I consider them to be without merit, I shall apply to the Director of this Office, pursuant to section 502.25(i) of the Rules of Procedure for Claims, a copy of which is enclosed, for the entry of an Order allowing your claim in the principal amount stated above, plus interest, and dismissing any portion over and above that amount on the ground that there is no debt due and owing to you by the Yokohama Specie Bank, Ltd. in excess of that amount.

In acting upon my application, the Director will consider the statement of objections that you may have submitted.

On the other hand, if within the next forty-five days you do not submit the original certificates of deposit or a statement explaining why they cannot be forwarded, I shall conclude that the claim has been abandoned in its entirety and, without further notice to you, shall apply to the Director for the entry of an Order dismissing the claim on the ground of abandonment, pursuant to section 502.25(g) and (i) of the Rules of Procedure for Claims.

To recapitulate:

1. If you wish to maintain your claim with this Office, you should within forty-five days forward the original certificates of deposit and, if you wish to do so, file a statement of your objections to the allowance of the claim in the amount stated above.

2. If you wish to maintain your claim but do not have the original certificates of deposit, you should within forty-five days submit a statement, signed and sworn to before a Notary Public, giving the details of the deposits and stating that you have not received payment or renewed certificates. If you wish to do so, you may also file a statement of your objections to the allowance of the claim in the amount stated.

3. I shall then apply to the Director for an Order allowing your claim in the principal amount stated above, plus interest, and dismissing any portion over and above that amount. Where objections have been filed, they will be submitted to the Director for his consideration in acting upon your claim.

4. If, within forty-five days, you do not submit the original certificates of deposit or an explanation as to why you cannot forward them, I shall conclude that the claim has been abandoned and shall apply to the Director for an Order dismissing the claim on that ground.

5. If you prefer to utilize the funds in Japan, you should sign and mail the inclosed Notice of Cancellation of Claim card in order to clear the records of this Office.

Please note that the original certificates must be submitted; photostatic copies cannot be substituted.

Sincerely yours,

/s/ DANIEL G. MCGRATH,
Chief, Claims Administration Section
Office of Alien Property.

Enclosures

cc: Wirin, Rissman & Okrand,
Attorneys at Law,
257 South Spring Street,
Los Angeles 12, California.

UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE
Office of Alien Property
Washington, D. C.

Debt Claim No. 49102

In the Matter of: KANEKICHI MURAKAMI—Claimant (Insolvent Estate of the Yokohama Specie Bank, Ltd., alleged debtor, V.O. Nos. 1501, et al.)

ORDER DISMISSING DEBT CLAIM
(Abandonment)

Pursuant to section 502.25(i) of the Rules of Procedure for Claims of this Office (8 CFR 502.25(i)), the Chief of the Claims Administration Section by letter dated July 29, 1959, notified the claimant by registered mail, return receipt requested, that unless necessary information for the processing of the claim under section 34 of the Trading with the Enemy Act, as amended (50 U.S.C. App. 34), was received within forty-five (45) days from the date of said letter, he would apply to the Director for an Order dismissing the claim on the ground of abandonment. A copy of section 502.25(g) and (i) of the Rules of Procedure for Claims was enclosed with the letter, setting forth the claimant's right to object to the proposed dismissal. More than forty-five days have elapsed since the mailing of the letter and no reply has been received with respect thereto.

Upon the application of the Chief of the Claims Administration Section and finding that the said claim has been abandoned;

IT IS ORDERED that this claim be and it is hereby dismissed and disallowed. It should be noted that the aggregate of debt claims filed against the Yokohama Specie Bank, Ltd., exceeds the money from which payment may be made by this Office and that any further proceedings are governed by section 34(f) of the Trading with the Enemy Act, as amended.

Dated at Washington, D. C. 29 September 1959.

(signed) PAUL V. MYRON.
DALLAS S. TOWNSEND,
Assistant Attorney General,
Director, Office of Alien Property.

DGMcG:ABD:djw
Claim No. 49102

REGISTERED MAIL #784314
CLAIMANT: Kanekichi Murakami,
450 No. 12th West,
Salt Lake City, Utah.

NOTICE

Attached is a copy of a Final Schedule issued under Section 34(f) of the Trading with the Enemy Act, as amended (50 U.S.C. App. 34), in respect of the Yokohama Specie Bank, Ltd., an insolvent debtor, listing the claims in respect of said debtor allowed as priority (3) claims and as non-priority claims and the payments to be made thereon. If your claim is not shown on the Schedule, it is for the reason that the claim has been dismissed and disallowed by this Office.

This Schedule is being served by registered mail on all claimants listed therein, as well as on claimants whose claims have been dismissed and disallowed. Pursuant to Section 34(f) of the Trading with the Enemy Act, as amended, any claimant considering himself aggrieved by this Final Schedule may, within sixty (60) days from the date of the mailing of the Schedule, file in the United States District Court for the District of Columbia a complaint for review of this Schedule, naming the Attorney General as defendant. A copy of such complaint must be served on the Attorney General and on each claimant named in the Schedule. If no such complaint for review is filed within the sixty-day period, payments to claimants will be made by this Office as specified in the Final Schedule.

Date. October 4, 1961.

PAUL V. MYRON,
Deputy Director,
Office of Alien Property.

Enclosure

Filed December 29, 1964

AFFIDAVIT

JULIAN M. HARE, being duly sworn, deposes and says:

1. I am the duly appointed Records Officer of the Office of Alien Property, Department of Justice, and as such I have custody of all the files and records relating to the operation of the Office.

2. I have caused a diligent search to be made of the records and files in my custody to ascertain when copies of the Yokohama Specie Bank Ltd. Final Schedule signed by the Deputy Director of the Office of Alien Property on May 11, 1961, were mailed by registered mail to claimants who had filed debt claims against the vested property of the Yokohama Specie Bank Ltd., which had not been withdrawn, as required by Section 34(f) of the Trading with the Enemy Act, 50 U.S.C. App. 34(f).

3. My examination of the said files disclosed that such Yokohama Specie Bank Ltd. Final Schedules were mailed to the claimants between August 22, 1961 and October 19, 1961, inclusive.

JULIAN M. HARE.

Sworn to before me this 20th day of November, 1964.

DONNA A. COWDEN,
Notary Public, District of Columbia.

[SEAL]

My Commission expires September 30, 1966.

Filed March 31, 1965, Harry M. Hull, Clerk

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1179-64

AYAKO HONDA, ET AL., *Plaintiffs*,

v.

NICHOLAS deB. KATZENBACH, Attorney General of the United States, *Defendant*

ORDER

Defendant's motion to dismiss having come on for hearing and the Court having considered the memoranda in support thereof and in opposition thereto, having heard argument of counsel, and having concluded that the Court lacks jurisdiction over the subject matter of this action because it was not commenced within the time set forth in Section 34(f) of the Trading with the Enemy Act, as amended (50 U.S.C. App. 34(f), it is this 31st day of March, 1965

ORDERED that plaintiffs' complaint be and the same is hereby dismissed.

WILLIAM B. JONES,
Judge.

Filed April 2, 1965

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil No. 1179-64

AYAKO HONDA ET AL, *Plaintiffs,*

vs.

NICHOLAS deB. KATZENBACH, *Defendant.*

NOTICE OF APPEAL

Notice is hereby given this 2nd day of April, 1965, that plaintiffs hereby appeal to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 31st day of March, 1965, in favor of Defendant against said Plaintiffs.

JOHN SILARD,
Attorney for Plaintiffs,
1625 K Street, N.W., D.C.

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Filed July 9, 1964

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1630-64

MASAE KONDO, 4216 Cumberland Avenue, Los Angeles, California 90027, on behalf of herself and on behalf of all others similarly situated, *Plaintiff*,

v.

ROBERT F. KENNEDY, Attorney General of the United States, Department of Justice Building, Washington 25, D. C., *Defendant*.

COMPLAINT FOR DECLARATORY AND OTHER RELIEF

1. This Court has jurisdiction under 5 USC 1009, 28 USC 1331, 1357 and 2201, and 50 USC Appx. 34f, as amended.

2. Plaintiff is a former depositor in the Yokohama Specie Bank, Ltd., and had assets on deposit in said bank on December 7, 1941, evidenced by Certificates of Deposit issued to her, or those through whom she claims, in the United States in exchange for the deposit of dollars in said bank, which Certificates were redeemable upon demand in dollars at the offices of the bank in the United States or in Yen at the offices of the bank in Japan.

3. Defendant, Robert F. Kennedy, is the Attorney General of the United States. He is a successor in office to the Alien Property Custodian who on December 7, 1941 seized, and in 1943, pursuant to the Trading with the Enemy Act as amended (50 USC Appx. 34, 620), vested certain properties of the Yokohama Specie Bank, Ltd., including the funds plaintiff had on deposit therewith. Unless otherwise stated, the term defendant will be used hereinafter to refer to the named defendant and/or his predecessors in office or the Office of Alien Property, or his agents, as the context may require.

4. Plaintiff files this action on her own behalf and on

behalf of all persons similarly situated, namely those persons who filed timely debt claims with defendant pursuant to the Trading with the Enemy Act, but whose claims the defendant dismissed but who did not receive notice from defendant of said dismissal; and who had no knowledge of such dismissal.

5. On or about March 27, 1964, plaintiff learned for the first time, from newspaper accounts in the Japanese press, that her claim was not covered by the settlement which had been reached in *Abe* v. *Kennedy*, Civil Action Number 2529-61 in this Court.

6. Whereupon, through counsel, plaintiff, on or about April 3, 1964 communicated with defendant and made application to him for recognition of her claim and payment thereof. Said communication and application are referred to herewith, incorporated herein as though fully set forth and a copy thereof, including the affidavit referred to in said letter, are attached hereto as Exhibit A.

7. Thereafter, defendant advised plaintiff's attorney over the telephone that he was considering plaintiff's claim.

8. Subsequent thereto, on or about April 27, 1964, plaintiff's attorney was advised by defendant that if plaintiff did not have notice that her claim was dismissed and that her claim was not included in the Final Schedule, the defendant would allow the plaintiff's claim and pay said claim in the same proportion to be paid to claimants by virtue of the settlement in *Abe* v. *Kennedy*, Civil Action No. 2529-61 in this Court.

9. By letter dated May 13, 1964, defendant refused to allow plaintiff's claim. Said letter is referred to herewith, incorporated herein as though fully set forth and a copy thereof attached hereto as Exhibit B.

10. Plaintiff has no information or basis for stating and she does not state that defendant did not, on or about September 8, 1961, mail a copy of the Yokohama Specie Bank Final Schedule to her at 3619½ Bellevue Avenue, Los Angeles 26, California as set forth in defendant's letter of May 13, 1964, Exhibit B hereto. But plaintiff does state that she did not receive a copy of it. In this connection, plaintiff alleges that she moved from the Bellevue Avenue

address to her present address on Cumberland Avenue in or about January, 1959.

11. The refusal of defendant to pay plaintiff's valid debt claim is injurious, inequitable, contrary to the statutory rights of plaintiff and deprives her of property without due process of law.

12. Plaintiff is informed and believes and therefore alleges that there are others similarly situated with her who did not get proper notice and whose valid debt claims were not recognized by defendant.

WHEREFORE, plaintiff prays that she and those similarly situated with her, have their claims recognized at the ratio of 23.4 cents per yen or, in the alternative, on the same basis as the plaintiffs in the case of *Abe* v. *Kennedy*, No. No. 2529-61 in this Court, and for other appropriate relief.

JOSEPH L. RAUH, JR.,
JOHN SILARD,
1625 K Street, N.W.,
Washington 6, D. C.

A. L. WIRIN,
FRED OKRAND,
257 South Spring Street,
Los Angeles 12, California,
Attorneys for Plaintiff.

O/s

EXHIBIT A

3 April 1964

Certified Mail No. 289880
Return Receipt Requested

Armand DuBois, Esq.,
Department of Justice,
Washington 25, D. C.

Re: Mrs. Masae Kondo (nee Wakasugi), Yokohama Specie Bank, yen deposit certificate claim No. 4018 (Matter of the Insolvent Account of: The Yokohama Specie Bank, Ltd., Vesting Orders Nos. 915, et al, Accounts No. 39-23487-23492, inclusive, in the Office of Alien Property, Department of Justice) (Aratani v. Kennedy, Civil Action No. 3164-58; Sumiyoshi v. Kennedy, Civil Action No. 3228-58; Shigeno v. Kennedy, Civil Action No. 1176-59; Abe v. Kennedy, Civil Action No. 2529-61, all US DC DC)

Dear Mr. Dubois:

As you will see from the enclosed affidavit, Mrs. Kondo received no notification of the determination by the Office of Alien Property of her or any Yokohama Specie Bank yen deposit claim, nor of the fact, if it be a fact, that her claim was dismissed, nor of the fact that her name was not included in the Final Schedule of the Yokohama Specie Bank claims.

It is clear that, just as with her Sumitomo Bank claim, she expected to be included in any determination that was made and to process her claim to a conclusion. Accordingly, it would seem proper that she be included as among those who will participate in the distribution of the Yokohama Specie bank funds following conclusion of the court matters.

I write to request, and to ascertain, whether you will join with this office on behalf of Mrs. Kondo in an appropriate motion, or other proceeding, before the Court or the Office of Alien Property, to amend the Final Schedule or to otherwise include Mrs. Kondo in the distribution. You will note

that with her affidavit, her first opportunity, she attached her original certificates.

Your early consideration and reply will be appreciated.

Sincerely yours,

FRED OKRAND.

FO/s
Enc.

Certified Mail No. 289880, Return Receipt Requested

bcc: Mrs. Kondo

EXHIBIT B

May 13 1964

UNITED STATES DEPARTMENT OF JUSTICE
Washington, D.C.

ALM:BSA:ABD:lhm
Claim No. 30418

AIR MAIL

Mr. Fred Okrand
257 South Spring Street
Los Angeles 12, California

Dear Mr. Okrand:

Reference is made to your letter of April 3, 1964, with enclosed affidavit, concerning the above-numbered debt claim based upon certificates of deposit, totalling yen 15,216.82 or $42.07 at the post-war rate of exchange, that Mrs. Masae Kondo filed with this Office against the vested property of The Yokohama Specie Bank Ltd. under Section 34 of the Trading with the Enemy Act, as amended, 50 U.S.C. App. 34. Mrs. Kondo states in her affidavit that she has never received any communication from the Office of Alien Property requesting her to submit the original certificates of deposit or notifying her that her claim had been dismissed and was not included in The Yokohama Specie Bank Ltd. Final Schedule. Mrs. Kondo submits the original certificates at this time and requests that her claim be reinstated.

The records of this Office show that Mrs. Kondo's claim against The Yokohama Specie Bank Ltd. was dismissed on January 22, 1959 on the ground of abandonment, pursuant to Section 502.25(i) of the Rules of Procedure for Claims, when a registered letter, return receipt requested, dated November 28, 1958, from this office, requesting that Mrs. Kondo submit the original certificates on which the claim

was based, was returned by the Post Office with the notation "Unknown." By inadvertence, the letter of November 28, 1958 and the copy of the dismissal order of January 22, 1959 were mailed to Mrs. Kondo at her former address at 636 N. Virgil Avenue, Los Angeles 4, California. However, a copy of The Yokohama Specie Bank Ltd. Final Schedule with accompanying Notice which was sent to Mrs. Kondo by registered mail on September 8, 1961, was sent to her correct current address of 3619½ Bellevue Avenue, Los Angeles 26, California. Since Mrs. Kondo's claim had been dismissed, it did not appear on The Yokohama Specie Bank Ltd. Final Schedule.

On this state of facts, no basis has been shown for reinstating Mrs. Kondo's claim. As required by Section 34(f) of the Act, and by Section 502.202(e) of the Rules of Procedure for Claims (8 CFR 502.202), Mrs. Kondo was properly served with a copy of The Yokohama Specie Bank Ltd. Final Schedule. The Notice attached to the copy of the Final Schedule, which was mailed to Mrs. Kondo on September 8, 1961 at her Bellevue Avenue address, informed her that if she considered herself aggrieved by the failure of her claim to appear on the Final Schedule she could file a complaint for review of the Final Schdeule under Section 34(f) of the Act within 60 days from the date of the mailing of the Final Schedule. No timely complaint was filed by Mrs. Kondo.

The proposed compromise settlement of yen deposit claims, provisionally approved on March 17, 1964 by Judge Leonard P. Walsh in the United States District Court for the District of Columbia, will benefit only Sumitomo Bank Ltd. and Yokohama Specie Bank Ltd. yen deposit claimants who claims appeared on the Final Schedules of the two banks issued under Section 34(f) of the Act as allowed at the post-war rate of exchange, and who participated in the litigation respecting yen deposit claims. As far as her claim against The Yokohama Specie Bank Ltd. is concerned, Mrs. Kondo cannot qualify for inclusion in this group.

I am returning the original certificates of deposit attached to Mrs. Kondo's affidavit.

Very truly yours,

JOHN W. DOUGLAS,
Assistant Attorney General,
Civil Division.

By: ANTHONY L. MONDELLO,
Deputy Director,
Office of Alien Property.

Enclosures

AFFIDAVIT OF MRS. MASAE KONDO

RE: Yokohama Specie Bank deposits

STATE OF CALIFORNIA,
County of Los Angeles, ss:

I, MASAE KONDO, being duly sworn, depose and say:

My maiden name was Wakasugi.

On September 9, 1947 and again on October 14, 1947 I wrote the Office of Alien Property. A copy of said letters is attached hereto as Exhibit A.

In October, 1947 I received a letter dated October 21, 1947 from the Office of Alien Property. A copy of said letter is attached hereto as Exhibit B.

Purusuant to said letter of October 21, 1947, and on or about October 28, 1947, I sent in to the Office of Alien Property, Department of Justice, 2 Notice of Claim for Payment of Debt forms No. APC-1c. One form was for my deposits with the Sumitomo Bank for certificate numbers 12490, 17685, 17315, 17314, 17375, 17741. The second form was for my deposits with the Yokohama Specie Bank for certificate numbers 71592 (Yen 1,182.51), 71593 (Yen 1,166.17), 71651 (Yen 5,028.24), 71652 (Yen 7839.90). The certificates in both banks were made out in the name of either my deceased mother (Katsue Wakasugi) or my deceased father (Mankichi Wakasugi) or in the case of only one, as I now recall (No. 71593 of the Yokohama Specie Bank), in the name of my father and myself. The total number of yen as to the Yokohama Specie Bank certificates is 15,216.82. The amount as to Sumitomo is Yen 5066.

At the same time I sent in the claim forms I attached photostatic copies of the certificates as to both banks.

By postcard dated November 12, 1947, I received acknowledgment from the Office of Alien Property of the receipt of the forms. A copy of that postcard is attached hereto as Exhibit C.

By letter dated November 4, 1948, I received what I take it was the formal notice from the Office of Alien Property

of my Sumitomo Bank claim. A copy of that letter is attached hereto as Exhibit D.

I also received a letter dated November 26, 1947 from the Office of Alien Property similar to the one I had received dated October 21, 1947 (Exhibit B attached hereto). A copy of that letter is attached hereto as Exhibit E.

In January, 1949, I received what I take it was the formal notice from the Office of Alien Property of my Yokohama Specie Bank claim. A copy of said letter is attached hereto as Exhibit F.

When I moved from Chicago, to Los Angeles, in 1948, I notified the Office of Alien Property that my address was changed from 2150 N. Lincoln Avenue, Chicago 14, Illinois to 636 N. Virgil Avenue, Los Angeles, California.

In 1951 we moved from the Virgil Avenue address to 3619½ Bellevue Avenue, Los Angeles 26, California and I notified the Office of Alien Property of that change by letter dated August 28, 1951.

In February, 1958, I received a letter dated February 3, 1958 regarding my Sumitomo Bank Claim. Attached hereto is a copy of that letter as Exhibit G.

I replied to the letter of February 3, 1958 on February 27, 1958 as per copy attached hereto as Exhibit H. At the same time, per the request in the February 3 letter, I sent in my original Sumitomo Bank certificates.

On or about October 28, 1958, I received in the mail from the Office of Alien Property a pamphlet entitled "Final Schedule", "In the Matter of the Insolvent Account of The Sumitomo Bank, Ltd., Vesting Orders Nos. 162, et al. Account No. 39-705." This Sumitomo Bank Final Schedule is the last communication I received from the Office of Alien Property. I received no communication, similar to the letter of February 3, 1958 (Exhibit G attached hereto) advising me that any determination had been made of my Yokohama Specie Bank claim nor asking me to send in the original deposit certificates, nor did I receive any "Final Schedule" as to the Yokohama Specie Bank. I did not know that any ruling had been made as to the Yokohama Specie Bank until I read about it in a newspaper on or about Friday, March 27, 1964.

On March 31, 1964 I notified the Office of Alien Property of my change of address from Bellevue Avenue to 4216 Cumberland Avenue, Los Angeles, California 90027.

It has been my intention all along to process my Yokohama Specie Bank claim. It is in a larger amount than the Sumitomo Bank claim. Had I received a letter regarding my Yokohama Specie Bank claim similar to the letter of February 3, 1958 (Exhibit G attached hereto) regarding my Sumitomo Bank claim or any request for me to send in my Yokohama Specie Bank certificates, I would have done so just as I did in the case of my Sumitomo Bank certificates. I attach hereto said 4 original Yokohama Specie Bank Certificates.

MASSE KONDO.

Subscribed and sworn to before me this 3rd day of April 1964.

Sheila M. Schaum,
Notary Public in and for said County and State.

My Comm. Exp. May 1, 1964.

EXHIBIT G

DEPARTMENT OF JUSTICE
Office of Alien Property
Washington 25, D.C.

February 3, 1958.

ABD:DBW:hhl
Claim No. 30417

REGISTERED MAIL
RETURN RECEIPT REQUESTED

Mrs. Masae Kondo,
3619½ Bellevue Avenue,
Los Angeles 26, California.

Dear Mrs. Kondo:

Reference is made to the above-numbered debt claim which has been filed with this Office with respect to the insolvent account of the Sumitomo Bank, Ltd. The claim is based upon yen certificates of deposit.

The Director of this Office decided on November 13, 1957, *In the Matter of Kunio Abe, et al.*, Claim No. 55507, Docket No. 55 D 72, which decision the Attorney General has declined to review, that yen certificates of deposit issued by the Yokohama Specie Bank, Ltd. and the Sumitomo Bank, Ltd. are obligations payable in yen in Japan, and that claims based on such certificates of deposit are to be allowed and paid in United States currency at the post war rate of exchange in accordance with the "Judgment Day" rule set forth in *Deutsche Bank* v. *Humphrey*, 272 U.S. 517 (1926). Thus, the current rate of exchange of 361.55 yen to one dollar must be used in converting the yen into a dollar amount. Interest is allowable from the date of deposit to the date of payment.

Therefore, if you submit your original certificates of deposit to this Office, I can recommend your claim for allowance in the sum of $14.00 plus interest. If you have lost your certificates you should so advise me and state the branch in Japan of the Bank to which the remittances were

forwarded. We will then attempt to trace your deposits on the records of the Bank.

Payment of your claim, however, will not be made immediately. Under the procedures set forth in section 34(f) of the Trading with the Enemy Act, as amended (50 U.S.C. App. 34(f)), it is necessary that all of the approximately 9000 claims filed against the Sumitomo Bank, Ltd. be reviewed and a schedule issued showing the proposed payments before any payments can be made. Within sixty days after the issuance of the schedule, any aggrieved claimant may file in the District Court of the United States for the District of Columbia a complaint for review of such schedule, naming the Attorney General as defendant. If no complaint for review is filed, payments will be made in accordance with the schedule.

Advice received by this Office is to the effect that yen certificate of deposit accounts are carried on the books of the Sumitomo Bank, Ltd. in Japan, and the funds may be withdrawn in that country. Under the circumstances, you may wish to utilize the funds in Japan rather than await settlement by this Office. If this is done, the Notice of Claim filed with this Office should be withdrawn by signing and mailing the enclosed Notice of Withdrawal card.

If, however, you wish to maintain your claim with this office, you are requested to submit the original certificates of deposit and to amend your claim to the above amount. A letter stating that you are willing to so amend your claim will be sufficient. In the event you object to the allowance of your claim in this amount, you should submit the certificates to this Office within the next thirty days and file a statement specifying your objections, together with the reasons in support thereof. Upon receipt of your objections, if I consider them to be without merit, I shall apply to the Director of this Office, pursuant to section 502.25(i) of the Rules of Procedure for Claims, a copy of which is enclosed, for the entry of an Order allowing your claim in the principal amount stated, plus interest, and dismissing any portion over and above that amount on the ground that there is no debt due and owing to you by the Sumitomo Bank, Ltd. in excess of that amount. In

acting upon my application, the Director will consider the statement of objections that you may have submitted.

On the other hand, if within the next thirty days you do not submit the original certificates of deposit or an explanation as to why they cannot be forwarded, I shall conclude that the claim has been abandoned in its entirety and, without further notice to you, shall apply to the Director for the entry of an Order dismissing the claim on the ground of abandonment, pursuant to section 502.25(g) and (i) of the Rules of Procedure for Claims.

To recapitulate:

1. If you wish to maintain your claim, you should within thirty days forward the original certificates of deposit and:

   a. Amend your claim to the amount stated, or

   b. State your objections to the allowance of the claim in that amount.

2. If you wish to maintain your claim but do not have the original certificates of deposit, you should so advise me within thirty days, giving the name of the branch in Japan to which your funds were remitted, and:

   a. Amend your claim to the amount stated, or

   b. State your objections to the allowance of the claim in that amount.

3. Where objections have been filed, if I consider them to be without merit, I shall apply to the Director for an Order allowing your claim in the principal amount stated, plus interest, and dismissing any portion over and above that amount.

4. If, within thirty days, you do not submit the original certificates of deposit or an explanation as to why you cannot forward them, I shall conclude that the claim has been abandoned and shall apply to the Director for an Order dismissing the claim on that ground.

5. If you prefer to utilize the funds in Japan, you should sign and mail the enclosed Notice of Withdrawal card in order to clear the records of this Office.

Sincerely yours,

Arthur R. Schor,
Chief, Claims Section,
Office of Alien Property.

Enclosures

TITLE 8—ALIENS AND NATIONALITY

CHAPTER II—OFFICE OF ALIEN PROPERTY, DEPARTMENT OF JUSTICE PART 502—RULES OF PROCEDURE FOR CLAIMS UNDER THE TRADING WITH THE ENEMY ACT.

Section 502.25—MOTION TO DISMISS.

Paragraph (i) of Section 502.25 of the Rules provides:

> Notwithstanding the provisions of this section the Chief of the Claims Section may serve a notice upon the claimant that, after the expiration of a time fixed in the notice, which time shall not be less than thirty (30) days, he intends to apply to the Director for an order dismissing the claim. The notice shall state the grounds for dismissal and the claimant may, within the time indicated in the notice, file a statement specifying his objections to dismissal, together with his reasons in support thereof; any evidence or other material in support of the claim which has not previously been filed with this Office shall be filed by the claimant with the statement of objections. Upon application by the Chief of the Claims Section for an Order dismissing the claim, the Director will consider the objections if any which may have been filed. The Director thereafter may remand the application to the Chief of the Claims Section for further proceeding under these rules, or in the case of *non-excepted claims* if it appears to him that there is no genuine issue may issue an order dismissing the claim. In cases of *excepted claims* where the Director is of the opinion there is no genuine issue he shall transmit the record together with any objections which have been filed to the dismissal of the claim to the Attorney General, and upon approval by the Attorney General, the Director shall enter an order dismissing the claim. (21 F.R. 1582, March 1, 1956)

§ 502.2(h) provides: "The terms 'excepted claim' means (1) any title claim which involves the return of assets

having a value of $50,000 or more and any debt claim in the amount of $50,000 or more; * * * *" and

§ 502.2(i) provides: "The term 'non-excepted claim' shall mean any claim other than an 'excepted claim'." (21 F. R. 1580, March 14, 1956)

NOTICE OF WITHDRAWAL

Claim No. 30417 Date.
Claimant Mrs. Masae Kondo
Debtor SUMITOMO BANK, LTD.

(I hereby withdraw the above claim)

_____

(claimant)

by _____ _____

EXHIBIT H

3619½ Bellevue Avenue
Los Angeles 26, California
27 February 1958

Claim No. 30417

Department of Justice,
Office of Alien Property,
Washington 25, D.C.

In re: ABD:DRW:hhl

Gentlemen:

I am in receipt of your letter of February 3, 1958 concerning my Sumitomo Bank claim.

Per your request, I transmit herewith certificate numbers 12490, 17314, 17315, 17375, 17685 and 17741.

I decline to amend my claim to the amount stated in your letter ($14.00) as I believe the amount is grossly unfair.

My objections are that I believe I am entitled to the return of the actual dollars which the Government seized. I do not know legal terms and whether this should be phrased in terms of rate of exchange except that it seems to me that when the Government took a certain amount of money that did not belong to it but belonged to other people that the people who owned the money should be paid back that amount.

Sincerely yours,

MRS. MASAE KONDO.

Enclosures

Filed September 4, 1964

ANSWER

Defendant, for his answer to the Complaint:

I. Denies each and every allegation of paragraph 1 of the complaint.

II. Denies the allegation of paragraph 2 of the complaint that plaintiffs' certificates of deposit were redeemable upon demand in dollars at the offices of the Yokohama Specie Bank Ltd. in the United States, but except as thus expressly denied, admits the allegations of paragraph 2 of the complaint.

III. Denies the allegation of paragraph 3 of the complaint that the vested property of the Yokohama Specie Bank Ltd. in the United States included funds that the plaintiff had on deposit there but except as thus expressly denied admits the allegations of paragraph 3 of the complaint.

IV. Admits the allegations of paragraph 4 of the complaint.

V. Denies any knowledge or information sufficient to form a belief as to each and every allegation of paragraph 5 of the complaint.

VI. Denies any knowledge or information sufficient to form a belief as to each and every allegation of paragraph 6 of the complaint.

VII. Denies any knowledge or information sufficient to form a belief as to each and every allegation of paragraph 7 of the complaint.

VIII. Denies each and every allegation of paragraph 8 of the complaint.

IX. Admits the allegations of paragraph 9 of the complaint.

X. Denies any knowledge or information sufficient to form a belief as to each and every allegation of paragraph 10 of the complaint.

XI. Denies each and every allegation of paragraph 11 of the complaint.

XII. Denies any knowledge or information sufficient to form a belief as to each and every allegation of paragraph 12 of the complaint.

WHEREFORE, defendant demands judgment dismissing the plaintiff's Complaint.

JOHN W. DOUGLAS,
Assistant Attorney General,
Civil Division.

ANTHONY L. MONDELLO,
ARMAND B. DUBOIS,
Attorneys for Defendant,
Department of Justice,
Office of Alien Property.

Filed December 29, 1964

DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

Defendant moves to dismiss the complaint on the ground that the Court lacks jurisdiction over the subject matter of this action because it was not commenced within the time set forth in Section 34(f) of the Trading with the Enemy Act, as amended (50 U.S.C. App. 34(f)).

JOHN W. DOUGLAS,
Assistant Attorney General.

ANTHONY L. MONDELLO,
ARMAND B. DUBOIS,
Attorneys for Defendant.

UNITED STATES OF AMERICA
Department of Justice
Office of Alien Property
Washington, D. C.

Debt Claim No. 30418

In the Matter of: MASAE KONDO (Insolvent Estate of the Yokohama Specie Bank Ltd., alleged debtor, V.O. Nos. 1501, et al.)

ORDER DISMISSING DEBT CLAIM
(Abandonment)

Pursuant to section 502.25(i) of the Rules of Procedure for Claims of this Office (8 CFR 502.25(i)), the Chief of the Claims Section by letter dated November 28, 1958, notified the claimant by registered mail, return receipt requested, that unless necessary information for the processing of the claim under section 34 of the Trading with the Enemy Act, as amended (50 U.S.C. App. 34), was received within forty-five days from the date of said letter, he would apply to the Director for an Order dismissing the claim on the ground of abandonment. A copy of section 502.25(g) and (i) of the Rules of Procedure for Claims was enclosed with the letter, setting forth the claimant's right to object to the proposed dismissal. The aforementioned letter of notification from the Claims Section was returned to this Office by the postal authorities bearing the notation stamp: "Unknown"

Upon the application of the Chief of the Claims Section and finding that the said claim has been abandoned;

IT IS ORDERED that this claim be and it is hereby dismissed and disallowed. It should be noted that the aggregate of debt claims filed against the Yokohama Specie Bank, Ltd., exceeds the money from which payment may be made by this Office and that any further proceedings

are governed by section 34(f) of the Trading with the Enemy Act, as amended.

Dated at Washington, D.C.

(Signed) PAUL V. MYRON,
Deputy Director,
Office of Alien Property.

January 22, 1959.

DEPARTMENT OF JUSTICE
Office of Alien Property
Washington 25, D.C.

Claim No. 30418
DGMcG:ABD.lhm

REGISTERED MAIL 784651
CLAIMANT: Mrs. Masae Kondo,
3619 ½ Bellevue Avenue,
Los Angeles 26, California.

NOTICE

Attached is a copy of a Final Schedule issued under Section 34(f) of the Trading with the Enemy Act, as amended (50 U.S.C. App. 34), in respect of the Yokohama Specie Bank, Ltd., an insolvent debtor, listing the claims in respect of said debtor allowed as priority (3) claims and as non-priority claims and the payments to be made thereon. If your claim is not shown on the schedule, it is for the reason that the claim has been dismissed and disallowed by this Office.

This schedule is being served by registered mail on all claimants listed therein, as well as on claimants whose claims have been dismissed and disallowed. Pursuant to Section 34(f) of the Trading with the Enemy Act, as amended, any claimant considering himself aggrieved by this Final Schedule may, within sixty (60) days from the date of the mailing of the Schedule, file in the United States District Court for the District of Columbia a complaint for review of this Schedule, naming the Attorney General as defendant. A copy of such complaint must be served on the Attorney General and on each claimant named in the Schedule. If no such complaint for review is filed within the sixty-day period, payments to claimants will be made by this Office as specified in the Fnal Schedule.

PAUL V. MYRON,
Deputy Director,
Office of Alien Property.

Date: September 8, 1951

Enclosure

Filed December 29, 1964

AFFIDAVIT

Julian M. Hare, being duly sworn, deposes and says:

1. I am the duly appointed Records Officer of the Office of Alien Property, Department of Justice, and as such I have custody of all the files and records relating to the operation of the Office.

2. I have caused a diligent search to be made of the records and files in my custody and find that a copy of the Yokohama Specie Bank Ltd. Final Schedule was mailed to Mrs. Masae Kondo on September 8, 1961, to 3619½ Bellevue Avenue, Los Angeles 26, California, in connection with her Claim No. 30418, and that said copy was not returned to this Office.

JULIAN M. HARE.

Sworn to before me this 20th day of November 1964.

DONNA A. COWDEN,
Notary Public, District of Columbia.

My Commission expires September 30, 1966.

Filed March 31, 1965, Harry M. Hull, Clerk

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1630-64

MASAE KONDO, ET AL., *Plaintiffs*,

v.

NICHOLAS DEB. KATZENBACH, Attorney General of the United States, *Defendant*

ORDER

Defendant's motion to dismiss having come on for hearing and the Court having considered the memoranda in support thereof and in opposition thereto, having heard argument of counsel, and having concluded that the Court lacks jurisdiction over the subject matter of this action because it was not commenced within the time set forth in Section 34(f) of the Trading with the Enemy Act, as amended (50 U.S.C. App. 34(f), it is this 31st day of March, 1965

ORDERED that plaintiffs' complaint be and the same is hereby dismissed.

WILLIAM B. JONES,
Judge.

Filed April 2, 1965

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil No. 1630-64

MASAE KONDO, ET AL., *Plaintiffs*,

vs.

NICHOLAS KATZENBACH, *Defendant*

NOTICE OF APPEAL

Notice is hereby given this 2 day of April, 1965, that plaintiffs hereby appeal to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 31 day of March, 1965 in favor of Defendant, against said Plaintiffs.

JOHN SILARD,
Attorney for Plaintiffs,
1625 K St., N.W., D.C.

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PAGE

[fol. 69]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,282

MASAE KONDO, et al., Appellants,

v.

NICHOLAS deB. KATZENBACH,
Attorney General of the United States, Appellee.

No. 19,283

MASARU OKAMOTO, et al., Appellants,

v.

NICHOLAS deB. KATZENBACH,
Attorney General of the United States, Appellee.

No. 19,284

AYAKO HONDA, et al., Appellants,

v.

NICHOLAS deB. KATZENBACH,
Attorney General of the United States, Appellee.

[fol. 70] On Appeals from the United States District Court for the District of Columbia.

Mr. John Silard and Mr. Fred Okrand of the bar of the Supreme Court of California, *pro hac vice*, by special leave

of court, with whom Messrs. Joseph L. Rauh, Jr., and A. L. Wirin were on the brief, for appellants.

Mr. David L. Rose, Attorney, Department of Justice, for appellee. Mr. John W. Douglas, Assistant Attorney General and Messrs. Sherman L. Cohn, Anthony L. Mondello and Armand B. DuBois, Attorneys, Department of Justice, were on the brief, for appellee.

Before: Danaher, Wright and Tamm, Circuit Judges.

OPINION—January 13, 1966

Tamm, Circuit Judge:

I

Presented to us in these cases, consolidated for hearing, is a precise question: Did the District Court correctly dismiss the appellants' complaints on the ground that the court lacked jurisdiction of the subject matter of the actions because the complaints were not filed within the 60-day limitation period prescribed by section 34(f) of the Trading with the Enemy Act (60 Stat. 925, 50 U.S.C. App. § 34(f))? (See Appendix A at 17-18.)

The three actions under review were filed in the District Court in May and July of 1964 and seek to set aside the dismissal by the Attorney General of appellants' debt claims based upon their deposits of yen in the American branches of the Yokohama Specie Bank, Ltd. Except for the claimant internees or parolees in No. 19,283, appellants are several thousand Americans of Japanese ancestry who, [fol. 71] residing in the United States, had, prior to December 7, 1941, made deposits in the American branches of the Yokohama Specie Bank, Ltd. The property in the United States of this Japanese bank was vested as Japanese Enemy Property under the Trading with the Enemy Act, 50 U.S.C., App. § 1. After liquidation by state superintendents of banks, there remained approximately $17 million, which was turned over to the Office of Alien Property.

Congress, on August 8, 1946, enacted section 34 of the Trading with the Enemy Act, which authorized the Alien

Property Custodian[1] to pay from the proceeds of vested property the debts of former owners of the vested property that were due and owing on the vesting date. Congress excluded from the benefits of this statute, among others, individuals and their successors who had been interned or paroled as potentially dangerous alien enemies under the Alien Enemy Act, 50 U.S.C. § 21.

Acting under section 34(b) of the Trading with the Enemy Act, the Alien Property Custodian fixed November 18, 1949, as the final date for filing debt claims with the Custodian against the funds of the Yokohama Specie Bank, Ltd. Approximately ten thousand debt claims were timely filed, of which some seven thousand, five hundred were based on yen deposits. Appellants in the present cases all filed claims in the amount of their deposits during this period. The aggregate of the claims exceeded the seized assets of the bank, necessitating a processing of the claims under section 34(f) of the Act relating to insolvent debtors' estates. Claims of persons who had [fol. 72] been interned or paroled under the Alien Enemy Act (50 U.S.C. § 21) were dismissed because of the express provision of section 34(b) of the Trading with the Enemy Act (see Appendix A at 16-17), which excluded such persons from the status of eligible debt clainants. This action constituted the final disposition under the Act of the claims of the appellants in case number 19,283.

Extensive hearings before an Examiner were conducted, and ultimately, in 1957, the Alien Property Custodian ruled that the claims were allowable at the post-war rate of exchange of 361.55 yen to the dollar, under the "Judgment Day" rule of *Deutsche Bank* v. *Humphrey*, 272 U.S. 517 (1926), since the deposits were payable in yen in

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[1] By Executive Order No. 9788 (October 14, 1946, 11 F.R. 11981), the Attorney General succeeded to the powers and duties of the Alien Property Custodian. The term "Custodian" or "Office of Alien Property" will be used to refer to the Alien Property Custodian, or the Attorney General as successor, as the context may require.

Japan. Thereafter, identical registered letters were sent to all eligible claimants,[2] numbering some seven thousand, five hundred, stating that their claim could be allowed at the 361.55 rate and requesting that the claimants' original yen certificates be submitted to the Office of the Alien Property Custodian. This letter was received by all appellants represented in cases number 19,282 and 19,284. The claims of appellants in case number 19,283 had been rejected initially, as heretofore indicated, and they were not recipients of the letter. A copy of the registered letter appears in Appendix B of this opinion.

Some further summation of the contents of the letter received by the claimants is essential to a consideration of the contentions of appellants in the *Honda* (No. 19,284) and *Kondo* (No. 19,282) cases. The letter, in addition to the provisions set forth above, informed these appellants that they might, if they wished, file a statement of their objections to the application of the 361.55, or post-war, rate of exchange. The letter informed claimants that if [fol. 73] their original certificates were not submitted within the designated period, or if an explanation of why the certificates could not be submitted was not timely submitted, the claim would be dismissed as having been abandoned. The letter also set forth that a schedule of claimants would be drawn up from the names of persons submitting their original deposit certificates or explanations. Included in the letter was the statement that "[w]ithin sixty days after the issue of the schedule any aggrieved claimant may file in the District Court of the United States for the District of Columbia a complaint for review of such schedule, naming the Attorney General as defendant. If no complaint for review is filed, payments will be made in accordance with the schedule."

Thereafter, one thousand, eight hundred seventeen deposit claims against the Yokohama Specie Bank, for

[2] The record also indicates that counsel of record for at least claimant Ayako Honda, No. 19,284, was sent a copy of this letter.

which either original certificates of deposit or satisfactory evidence of loss had been submitted, were allowed at the rate of 361.55 yen to the dollar. Carrying out the provision of section 34(f) of the Act (see Appendix A at 17-18), the Alien Property Custodian prepared and served by registered mail on all claimants (*id est,* allowed and dismissed claims and including claimants in cases 19,282, 19,283 and 19,284) a Final Schedule of all debt claims allowed and the proposed payment to each claimant. Claimants whose claims had been dismissed, including appellants in the *Okamoto* case (No. 19,283) were not listed on the Final Schedule. Included with the notice transmitting the Final Schedule to each claimant was the statement:

> "Pursuant to Section 34(f) of the Trading with the Enemy Act, as amended, any claimant considering himself aggrieved by this Final Schedule may, within sixty (60) days from the date of the mailing of the Schedule, file in the United States District Court for the District of Columbia a complaint for review of this Schedule, naming the Attorney General as de- [fol. 74] fendant. A copy of such complaint must be served on the Attorney General and on each claimant named in the Schedule. If no such complaint for review is filed within the sixty-day period, payments to claimants will be made by this Office as specified in the Final Schedule."

A timely complaint for review of the award was brought in the United States District Court for the District of Columbia in 1961 asserting that the claims should have been allowed by the Custodian at the pre-war dollar rate of exchange for yen. This action (*Abe* v. *Kennedy,* C.A. 2529-61) was pursued in behalf of all Yokohama Specie Bank yen deposit claimants whose claims had been allowed on the Final Schedule. Proceedings in the *Abe* case were postponed, however, pending the outcome of a companion case, *Aratani* v. *Kennedy,* C.A. 3164-58, which had been

filed in 1958 and which related to the yen deposit claims which had been asserted against vested funds of the Sumitomo Bank, Ltd. The chronology and disposition of this case are set forth in the court's opinion published in 115 U.S. App. D.C. at page 97 and in 317 F.2d at page 161. The opinion affirming summary judgment in favor of the Government certainly invited *certiorari,* and on October 21, 1963, the Supreme Court granted *certiorari,* 375 U.S. 877. Before disposition by the Supreme Court, however, the Attorney General settled the Sumitomo Bank, Ltd. case on an exchange rate much more favorable to the claimants and simultaneously, or virtually so, settled the yen deposit claims on the Final Schedule of the Yokohama Bank case at a rate approximating a net return to the claimants of 49 per cent of the amount claimed. The settlements were approxed in the United States District Court for the District of Columbia on May 18, 1964,[3] 228 F.Supp. 706. After payment of the settlement sums, about [fol. 75] $10 million remains in the Yokohama Specie Bank, Ltd. account in the Office of Alien Property.

Against this background, the identity of the appellants in our present cases comes into sharper focus. In the *Kondo* (No. 19,282) and *Honda* (No. 19,284) cases, we have before us several thousand depositors in the Yokohama Specie Bank who, although recipients of the notices heretofore described as issuing from the Alien Property Custodian, declined or failed to file their original deposit certificates with the Custodian. Whatever reasons may have prompted or caused this action, these depositors were not listed on the Final Schedule for payment, were not represented in the court action entitled *Abe* v. *Kennedy, supra,* and were were not included in the settlement effectuated by the District Court approval of May 18, 1964. By actions filed in the District Court in the *Honda* case on May 19, 1964, and in the *Kondo* case on July 9,

[3] The Supreme Court thereafter dismissed the writ of *certiorari* in the *Aratani* case on March 9, 1965, 380 U.S. 938.

1964, these appellants sought to compel the Attorney General to pay to them on their deposits in the Yokohama Specie Bank a pro rata amount from the funds remaining in the Bank's vested account upon the same basis as was paid to the claimants in the *Abe* case. Similarly, in the *Okamoto* case, No. 19,283, in a complaint filed in the District Court on July 6, 1964, appellants, as depositors in the Yokohama Specie Bank whose claims were disallowed on the ground that they had been interned and paroled as alien enemies, seek a like portion of the remaining vested funds.

The District Court, on March 31, 1965, dismissed all three actions on the ground that the court lacked jurisdiction over the subject matter of the actions because they were not commenced within the time set forth in section 34(f) of the Trading with the Enemy Act (50 U.S.C. App. § 34(f)).

II

Appellants in the *Kondo* and *Honda* cases contend that [fol. 76] the District Court should have invoked equitable estoppel against the 60-day limitation period; that estoppel is applicable to suits arising under the Trading with the Enemy Act; that the sovereign immunity doctrine contains nothing warranting an implied exemption for the Government from the estoppel principle of *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959); and exemption from the *Glus* estoppel doctrine creates a constitutional issue under the just compensation provisions of the Fifth Amendment. We treat first the presentation of these appellants.

III

Basing their first argument on a chronological treatment of the events transpiring between December 7, 1941 and March 31, 1965, these appellants argue that the 1958 letter of the Custodian to each claimant was a "discourage-

ment" and "insult" to the claimants, who had waited 17 years for the money seized by the vesting precedure. Concluding that the text of this letter was confusing, insulting and arbitrary, appellants argue that they were not told why their original certificates surrender was being demanded and why only two per cent of their deposits were being refunded, with a resulting inference that a surrender of the original certificate would constitute acquiescence in the two per cent formula and a waiver of further rights of the claimants. Appellants argue that their original certificates constituted their sole tangible remaining evidence of a claim, and because of illiteracy, language difficulties and other similar reasons they were reluctant to take any step which might either result in a loss of their claim or require them to accept a two per cent award. Accordingly, say this group, they awaited the outcome of the *Abe* v. *Kennedy* case "reasonably anticipa[ting] that if the two per cent formula which had long been in administrative litigation in *Abe* were reversed in the court all Yokohama [fol. 77] Bank depositors who had filed timely claims under the act which the Government had recognized as valid would be similarly compensated." Appellants conclude that their refusal to file their original deposit certificates and that their failure to sue or join in a suit while *Abe* was in litigation was "excusable delay" in view of their reasonable reliance upon the Government to treat them equally with claimants in the *Abe* case, especially since no prejudice accrued to the Government between 1961 and 1964 as a result of these appellants' inactivity.

In answer, the appellee points out that these actions arising under the Trading with the Enemy Act are suits against the Government. All conditions of the sovereign's consent to be sued must be complied with, and the failure to satisfy any such condition is fatal to the court's jurisdiction. Since the provision of section 34(f) of the Act creates a 60-day limitation upon the period in which a depositor may establish his status as a claimant or take other action, failure to meet this condition constitutes a

fatal failure to meet a prescribed condition precedent to the maintenance of the action.

There is no doubt that this action is a suit against the United States. *Banco Mexicano* v. *Deutsche Bank*, 263 U.S. 591, 602-3 (1924); *Codray* v. *Brownell*, 93 U.S. App. D.C. 112, 207 F.2d 610 (1953), *cert. denied* 347 U.S. 903 (1954). It is equally as well established that failure to satisfy the conditions of the United States' sovereign consent to be sued is fatal to the court's jurisdiction. *Brownell* v. *Nakashima*, 243 F.2d 787 (9th Cir.), *cert. denied* 355 U.S. 872 (1957); *Cisatlantic Corp.* v. *Brownell*, 131 F. Supp. 406 (S.D.N.Y. 1953), *affirmed* 222 F.2d 957 (2d Cir. 1955); *Von Clemm* v. *Smith*, 204 F.Supp. 110 (S.D.N.Y. 1962).

The 1958 letter attacked by appellants is set forth in the appendix of this opinion. (See Appendix B.) The ap- [fol. 78] pellee explains the necessity for requiring that the depositors submit their original certificates of deposit by pointing out that the certificates were redeemable to the holder by the banks in Japan, and in numerous cases had been so redeemed, and existence of the original certificates in the claimants' hands was essential to the establishment of an unsatisfied debtor status and in order to avoid double payment. The letter followed in meticulous detail and with painstaking care the requirements of the statute in notifying each of the thousands of depositors, not only of the Custodian's proposal but of the depositors' rights to file objections to the proposal and to initiate court action if they so desired. As heretofore set forth, the 60-day statutory limitation was set forth specifically and accurately. We question that the Custodian could more completely have outlined the significance of the proposal, creation and status of the forthcoming Final Schedule of Allowed Claims and the rights of the appellants under the statute. To characterize this letter as insulting requires an emotional approach unwarranted by the letter. That it was discouraging to its recipients is obvious. Those recipients were told, however, of the action

which they could take if they desired. In some instances, their attorneys were also informed. Their failure to act cannot, we feel, be attributed to any misrepresentation, either affirmatively or negatively, by the appellee. Whatever may have prompted the appellants' action, or lack of action, we conclude it was not any misleading act or inaction on the part of the Government.

IV

These appellants' contention that estoppel is applicable to suits arising under the Trading with the Enemy Act faces immediately our holding that "estoppel cannot be used against the Federal Government" in *Legerlatz* v. *Rogers,* 105 U.S. App. D.C. 256, 266 F.2d 457, 459 n.5 [fol. 79] (1959), *cert. dismissed,* 362 U.S. 938 (1960). That case also involved a suit for the return of vested property under the Act involved in the present case. Similar holdings may be found in *Anderegg* v. *United States,* 171 F.2d 127 (4th Cir. 1948), *cert. denied* 336 U.S. 967 (1949); *Wallace* v. *United States,* 142 F.2d 240 (2d Cir.), *cert. denied* 323 U.S. 712 (1944).

V

Next, these appellants reason that *Glus* v. *Brooklyn Eastern District Terminal, supra,* contains nothing warranting the conclusion that the appellee is excepted from the estoppel principle enunciated therein. We observe, first that the Government was not a party in the *Glus* case. Secondly, the *Glus* opinion is based upon an affirmative claim that the respondent had made a misrepresentation to the petitioner, thereby misleading him into a course of non-action. Utilizing the basic concept that no man may take advantage of his own wrong, the Supreme Court reversed in order to permit the petitioner to show whether he could, in fact, make out a case calling for the application of the doctrine of estoppel. The *Glus* case, however, does not pretend to announce any new or extended doc-

trine. Mr. Justice Black quotes in *Glus*, with approval, a statement of basic principle from *Insurance Company* v. *Wilkinson*, 80 U.S. (13 Wall.) 222, 233 (1871) wherein Mr. Justice Miller said:

> "The principle is that where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage. And although the cases to which this principle is to be applied are not as well defined as could be wished, the general doctrine is well understood and is applied by courts of law as well as equity where the technical advantage thus obtained is set up and relied on to defeat the [fol. 80] ends of justice or establish a dishonest claim."

We do not believe that the factual record before us permits a conclusion that the appellee "by his representations or his conduct induced" the appellants to give appellee any advantage. This being so, the question of whether the doctrine of estoppel restated in *Glus* is operative against the Government, or more specifically against this appellee, does not enter this case.

Insofar as appellants attempt to relate the estoppel principle of the *Glus* case, we refer back to the discussion of this factor in section II of this opinion and conclude that the record does not support appellants' contention on this point.

VI

Approaching their difficulties from the constitutional viewpoint, these appellants argue that the Fifth Amendment, in providing for due process, precludes the Government from any arbitrary or unreasonable intrusion upon private rights and requires that the Government be held to the highest standards of fairness and reasonableness, and they cite *Communist Party* v. *Subversive Activities*

Control Board, 351 U.S. 115 (1956); *Wong Yang Sung* v. *McGrath,* 339 U.S. 33 (1950); *Speiser* v. *Randall,* 357 U.S. 513 (1958), in support of this principle. Continuing, appellants charge that appellee's action with reference to their deposits in the Yokohama Bank constitutes a Government seizure of private property without judicial process. Citing *Central Union Trust Co.* v. *Garvan,* 254 U.S. 554, 566 (1921), the argument continues that the qualification of the alien property seizure therein is valid only "if adequate provision is made for a return in case of mistake" establishes a standard of "adequate provision," which because of the application of the 60-day limitation clause has not been met in this case.

[fol. 81] The appellee denies in rather general terms the existence of a constitutional issue in these cases.

The record supports the appellee's argument that the property taken and vested by the Custodian was the property of the Yokohama Specie Bank and not the property of the appellants. That deposits in banks become property of the bank and create a debtor-creditor relationship between bank and depositor is universally recognized. See *e.g., Anderson National Bank* v. *Luckett,* 321 U.S. 233 (1944); *Killoren* v. *First National Bank,* 127 F.2d 537 541 (C.C.A. 8th Cir. 1942); *Cicero State Bank* v. *Crowley,* 115 F.2d 1022 (C.C.A. 7th Cir. 1940). It follows that the property of the appellants—that is, the debt to them of the Yokohama Specie Bank—still belongs to appellants and has never been seized by the Custodian. The existence of this property in the control and possession of the appellants is further emphasized by the fact, heretofore pointed out, that each appellant may recover in Japan from the Yokohama Specie Bank on the basis of his original deposit certificate, albeit at a rate of exchange not pleasing or acceptable to him.

The constitutional question may be viewed from another viewpoint. Appellants are creditors of a wartime enemy commercial enterprise. The American-based assets were legally vested by valid Act of Congress. Thereafter, as a

matter of grace, Congress, by enacting section 34 of the Act, conferred upon certain creditors of enemy enterprises a means of attempting to recover upon their claims from those assets of the debtor which were held by the Custodian. The action did not, however, create a constitutional right in the creditors to recover. The practical effect of section 34 is to provide a means of pro rata distribution of vested funds among those claimant-creditors who are able under the statute to establish their right to this recovery. Certainly, the creditors have not acquired by section 34 of the Act a property right in vested funds. [fol. 82] We conclude that the appellants have not been deprived of any constitutional right by the appellee in these proceedings.

VII

Turning now to the *Okamoto* case, we recall that this group of appellants are the depositors in the Yokohama Specie Bank whose claims were rejected by the appellee because these people had been interned and paroled and were, consequently, barred by the statute from recovery of their deposits. It is argued on behalf of these appellants that the Government, to their detriment, is taking an inconsistent and consequently illegal position by first claiming the Trading with the Enemy Act created no rights for appellants and "does not apply to them," in permitting the processing of their deposit claims but later claiming that the Act's 60-day limitation clause does apply to appellants when they seek through the courts to press their suit. On this basis, these appellants, relying on *Interstate Commerce Comm'n.* v. *United States ex rel. Humboldt Steamship Co.*, 224 U.S. 474 (1912), argue that the courts have authority in this case by mandamus to compel the Custodian to accept the claims of appellants and to proceed to the merits of their claim. In advancing this argument, the appellants emphasize the distinction between the exercise of an agency's discretionary power and a denial of power from a misunderstanding of the law.

Our review of the *Humboldt Steamship Co.* case establishes a vital distinction from the situation that confronts us here. In *Humboldt*, the Interstate Commerce Commission "refused to proceed at all, though the law required it to do so," 224 U.S. at 485. Here, the Custodian exercised jurisdiction initially over these appellants' claims. The claims were reviewed and dismissed on the ground of ineligibility of the claimants under the provisions of the Act. Jurisdiction was exercised, and it was adverse to [fol. 83] appellants. Under these circumstances, proceedings in the nature of mandamus will not lie. But, say these appellants, mandamus will lie where " • • • the erroneous decision cannot be reviewed on appeal of writ of error," citing *Louisville Cement Co. v. Interstate Commerce Comm'n.*, 246 U.S. 638, 643 (1918). Unfortunately for this approach, we have in the present case statutory provision for review of the Custodian's action in rejecting the claims of these appellants. Section 34(f) of the Act provides a remedy which is an exclusive one and one which the claimants failed to utilize, although complaint for review was brought by a similarly situated depositor in another vested Japanese bank case. See *Sasaki* v. *Rogers*, 185 F.Supp. 191 (D.D.C. 1960).

A further contention of this group of claimants is that the Fifth Amendment prevents dismissal of their claims. Again, the short—and we think obvious—answer to this argument is that if the appellants desired to contest the constitutionality of the eligibility provisions of section 34 (a) of the Act, they could, and should, have filed a timely complaint for judicial review.

VIII

We conclude upon the entire record in all three cases that the District Court acted correctly in dismissing these cases on March 31, 1965.

IX

The unique and unfortunate circumstances which have deprived these appellants of their deposits in the Yokohama Specie Bank command sympathetic consideration of their problem. Arguments made to the court were broadly spiced with a strong emotional appeal. Appellants' sincere counsel valiantly attempted under the label of "equitable considerations" to lead the court to abandon established legal principles and upon purely humane [fol. 84] grounds return to the appellants the funds which represented their savings on December 7, 1941. Benevolence is a noble virtue, but it cannot be a foundation for legal opinions, regardless of the need of the litigant or the strictly emotional appeal of his plight. It is not for the courts to turn their backs upon legal principles, precepts and established law in order to accomplish an end which is suggested by a desire to accomplish a humane objective. To do so would immediately constitute the creation of a program of judicial legislation in complete disregard of our constitutional limitations and separation of powers. Obviously, Congress, enacting into law the will of the people, must write our country's laws. The dangers of wartime, the military and economic problems of the early 1940's, are far behind us. Perhaps now the necessities that required the enactment of the Trading with the Enemy Act have so far passed into history that Congress may wish to reconsider the status of these appellants and another disposition of their claims. It is not for the court to suggest to Congress what it should or should not do. We suggest only that the relief sought by these appellants lies solely in legislative hands.

Affirmed.

Appendix A

Section 34 of the Trading with the Enemy Act, 60 Stat. 925 (1946), 50 U.S.C. App. § 34 (1951).

Sec. 34(a). Any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, shall be equitably applied by the Custodian in accordance with the provisions of this section to the payment of debts owed by the person who owned such property or interest immediately prior to its vesting in or transfer to the Alien [fol. 85] Property Custodian. * * * Debt claims allowable hereunder shall include only those of citizens of the United States or of the Philippine Islands; those of corporations organized under the laws of the United States or any State, Territory, or possession thereof, or the District of Columbia or the Philippine Islands; those of other natural persons who are and have been since the beginning of the war residents of the United States and who have not during the war been interned or paroled pursuant to the Alien Enemy Act; * * *

Sec. 34(b). The Custodian shall fix a date or dates after which the filing of debt claims in respect of any or all debtors shall be barred, and may extend the time so fixed, and shall give at least sixty days' notice thereof by publication in the Federal Register. * * *

Section 34(f). If the aggregate of debt claims filed as prescribed exceeds the money from which, in accordance with subsection (d) hereof, payment may be made, the Custodian shall prepare and serve by registered mail on all claimants a schedule of all debt claims allowed and the proposed payment to each claimant. In preparing such schedule, the Custodian shall assign priorities in accordance with the provisions of subsection (g) hereof. Within sixty days after the date of mailing of such schedule, any claimant considering himself aggrieved may file in the District Court of the United States for the District of

Columbia a complaint for review of such schedule, naming the Custodian as defendant. A copy of such complaint shall be served upon the Custodian and on each claimant named in the schedule. The Custodian, within forty-five days after service on him, shall certify and file in said court a transcript of the record of proceedings in the Office of Alien Property Custodian with respect to such schedule. Upon good cause shown such time may be extended by the court. Such record shall include the claims in question as filed, such evidence with respect thereto as may have been presented to the Custodian or introduced into the record by him, any findings or other determinations made by the Custodian with respect thereto, and the schedule prepared by the Custodian. The court may, in its discretion, take additional evidence, upon a showing that such evidence was offered to and excluded by the Custodian [fol. 86] or could not reasonably have been adduced before him or was not available to him. Any interested debt claimant who has filed a claim with the Custodian pursuant to this section, upon timely application to the court, shall be permitted to intervene in such review proceedings. The court shall enter judgment affirming or modifying the schedule as prepared by the Custodian and directing payment, if any be found due, pursuant to the schedule as affirmed of modified and to the extent of the money from which, in accordance with subsection (d) hereof, payment may be made. Pending the decision of the court on such complaint for review, and pending final determination of any appeal from such decision, payment may be made only to an extent, if any, consistent with the contentions of all claimants for review.

Appendix B

(J.A. 6)

Exhibit A

Registered Mail
Return Receipt Requested

Ayako Honda
1576 Valota Road
Redwood City, California

Dear Sir:

Reference is made to the above-numbered debt claim which has been filed with this Office with respect to the insolvent account of the Yokohama Specie Bank, Ltd. The claim is based upon yen certificates of deposit.

The Director of this Office decided on November 13, 1957, *In the Matter of Kunio Abe, et al.*, Claim No. 55507, Docket No. 55 D 72, which decision the Attorney General has declined to review, that yen certificates of deposit issued by the Yokohama Specie Bank, Ltd., and the Sumitomo Bank, Ltd. are obligations payable in yen in Japan, and that claims based on such certificates of deposit are to be allowed and paid in United States currency at the post war rate of exchange in accordance with the "Judgment Day" rule set forth in *Deutsche Bank* v. *Humphrey*, 272 U.S. 517 [fol. 87] (1926). Thus, the current rate of exchange of 361.55 yen to one dollar must be used in converting the yen into a dollar amount. Interest is allowable from the date of deposit to the date of payment.

Therefore, if you submit your original certificates of deposit to this Office, I can recommend your claim for allowance in the sum of $9.09 plus interest. If you have lost your certificates, you should prepare a statement setting out that the deposits were made as alleged in the Notice of Claim form, giving the numbers of the certificates, the dates of the deposits, and the branch of the Bank at which the certificates were purchased. You should also

state that you have not received payment from the Bank or accepted renewed certificates of deposit. This statement should be signed and sworn to by you before a Notary Public and forwarded to this Office in support of your claim.

(J.A. 7)

Payment of your claim, however, will not be made immediately. Under the procedures set forth in section 34(f) of the Trading with the Enemy Act, as amended (50 U.S.C. App. 34(f)); it is necessary that all of the approximately 9000 claims filed against the Yokohama Specie Bank, Ltd. be reviewed and a schedule issued showing the proposed payments before any payments can be made. Within sixty days after the issuance of the schedule, any aggrieved claimant may file in the District Court of the United States for the District of Columbia a complaint for review of such schedule, naming the Attorney General as defendant. If no complaint for review is filed, payments will be made in accordance with the schedule.

Advice received by this Office is to the effect that yen certificate of deposit accounts are carried on the books of the Yokohama Specie Bank, Ltd. in Japan, and the funds may be withdrawn in that country or transferred to the Bank of Tokyo, Ltd. Under the circumstances, you may wish to utilize the funds in Japan rather than await settlement by this Office. If this is done, the Notice of Claim filed with this Office should be canceled by signing and mailing the enclosed Notice of Cancellation of Claim card.

[fol. 88] If, however, you wish to maintain your claim with this Office you are requested to submit the original certificates of deposit or the notarized statement as to why they cannot be forwarded. In the event you object to the allowance of your claim in the amount stated above, you should submit the certificates to this Office within the next forty-five days and file a statement specifying your objections, together with the reasons in support thereof. Upon receipt of your objections, if I consider them to be without merit, I

shall apply to the Director of this Office, pursuant to section 502.25(1) of the Rules of Procedure for Claims, a copy of which is enclosed, for the entry of an Order allowing your claim in the principal amount stated above, plus interest, and dismissing any portion over and above that amount on the ground that there is no debt due and owing to you by the Yokohama Specie Bank, Ltd. in excess of that amount. In acting upon my application, the Director will consider the statement of objections that you may have submitted.

(J.A. 8)

On the other hand, if within the next forty-five days you do not submit the original certificates of deposit or a statement explaining why they cannot be forwarded, I shall conclude that the claim has been abandoned in its entirety and, without further notice to you, shall apply to the Director for the entry of an Order dismissing the claim on the ground of abandonment, pursuant to section 502.25(g) and (i) of the Rules of Procedure for Claims.

To recapitulate:

1. If you wish to maintain your claim with this Office, you should within forty-five days forward the original certificates of deposit and, if you wish to do so, file a statement of your objections to the allowance of the claim in the amount stated above.

2. If you wish to maintain your claim but do not have the original certificates of deposit, you should within forty-five days submit a statement, signed and sworn to before a Notary Public, giving the details of the deposits and stating that you have not received payment or renewed certificates. If you wish to do so, you may also file a statement of your objections to the allowance of the claim in the amount stated.

[fol. 89] 3. I shall then apply to the Director for an Order allowing your claim in the principal amount stated above, plus interest, and dismissing any portion over and above that amount. Where objections have been filed, they will be

submitted to the Director for his consideration in acting upon your claim.

4. If, within forty-five days, you do not submit the original certificates of deposit or an explanation as to why you cannot forward them, I shall conclude that the claim has been abandoned and shall apply to the Director for an Order dismissing the claim on that ground.

5. If you prefer to utilize the funds in Japan, you should sign and mail the enclosed Notice of Cancellation of Claim card in order to clear the records of this Office.

(J.A. 9)

Please note that the original certificates must be submitted; photostatic copies cannot be substituted.

Sincerely yours,

ARTHUR R. SCHOR
Chief, Claims Section,
Office of Alien Property.

Enclosures

cc: Wirin, Rissman & Okrand,
257 South Spring Street,
Los Angeles 12, California.

WRIGHT, Circuit Judge, dissenting: I agree with the court that these cases command sympathetic consideration for these many thousands of Japanese-American appellants. Respectfully, I dissent from the court's conclusion that we are powerless to provide relief.

Appellants were depositors of the Yokohama Specie Bank, Ltd. when the bank's property in the United States was seized on Pearl Harbor Day and vested as enemy [fol. 90] property under the Trading with the Enemy Act, 50 U.S.C.App. §§ 1 *et seq.*, 40 STAT. 411. On August 8, 1946, Congress enacted § 34 of the Trading with the Enemy Act, 60 STAT. 925, which authorized the Alien Property Cus-

todian to pay from the vested proceeds the claims of former owners who were citizens or residents of the United States during World War II and who had not been interned or paroled as potentially dangerous alien enemies. Pursuant to § 34(b) of the Act, the Custodian fixed November 18, 1949, as the final date for filing claims against the Yokohama Bank. Appellants in *Honda,* No. 19,284, *Kondo,* No. 19,282, and *Okamoto,* No. 19,283, all filed timely claims. The Government refused to recognize the claims of appellants in *Okamoto* on the ground they were ineligible under the statute because they had been interned and paroled. This ruling was correct and disposes of that case.[1]

The claims of appellants in *Honda* and *Kondo* were recognized by the Custodian, however, to the extent that toward the end of 1958 they were sent letters as eligible claimants, instructing them to send in their original certificates of deposit or equivalent proof and informing them that if proper proof were submitted a recommendation would be made that their claims be allowed at the post-war rate of exchange, which amounted to approximately 2% of the pre-war rate. Appellants were further advised that any claim not timely submitted would be dismissed as [fol. 91] abandoned. Appellants failed to comply with the requirements of the 1958 letter.

Around September 1961 the Custodian prepared and sent by registered mail to all claimants a Final Schedule of all Yokohama Bank depositor claims allowed and the proposed payment in each case. A Notice was included advising that "[i]f your claim is not shown on the Schedule, it is for the reason that the claim has been dismissed and disallowed by this Office"; that any claimant considering himself aggrieved "may, within sixty (60) days" file

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[1] *Interstate Commerce Com'n* v. *Humboldt Steamship Co.,* 224 U.S. 474 (1912), is inapposite. In *Humboldt,* the I.C.C. "refused to proceed at all, though the law required it to do so." *Id.* at 485. Here, the Custodian exercised jurisdiction over these claims and denied them on the merits. Congress acted within its power when it excluded these appellants, non-citizens at the time of seizure, from the relief the statute affords. *Masami Sasaki* v. *Rogers,* D.D.C., 185 F.Supp. 191 (1960).

for judicial review; and that "[i]f no such complaint for review is filed within the sixty-day period, payments to claimants will be made" in accordance with the Schedule. Appellants did not file for judicial review within 60 days of the letter, as required by § 34(f) of the Act.

In *Abe* (pronounced "Ah-bey") v. *Kennedy*, a timely complaint, demanding payment at the pre-war rate, was filed in the District Court on behalf of all Yokohama Bank claimants who had complied with the Custodian's 1958 letter. Proceedings in *Abe* were stayed pending the outcome of *Aratani* v. *Kennedy*, which involved the same issue with depositors of a different Japanese bank.

The District Court granted the Government's motion to dismiss in *Aratani*, this court affirmed, 115 U.S.App. D.C. 97, 317 F.2d 161, 323 F.2d 427, and the Supreme Court granted *certiorari*, 375 U. S. 877 (1963). The Government then entered into a settlement with complainants in *Aratani* and *Abe*, which was referred to the District Court by the Supreme Court, 376 U.S. 936 (1964), and approved in 1964, D.D.C., 228 F.Supp. 706. The *Abe* settlement was for well over 60% of the amount claimed, and in fact came to approximately 100% of the original deposits without interest.[2] [fol. 92] Appellants' petition to be included in the settlement was denied by the Government on the ground that they were not parties to the litigation being compromised. They then brought these actions. The District Court granted a Government motion to dismiss for lack of jurisdiction because the complaints were filed long after the 60-day limitation period prescribed by the Act. This appeal challenges the dismissal.

I

Appellants urge us, under the circumstances of this case, to estop the Government from asserting the 60-day stat-

[2] The Government's statement implies that the settlement was for 49% of the amount claimed. Actually, 49% is the amount paid over to the claimants—*i.e.*, the total award less 20% for attorneys' fees. Brief for Respondent, p. 7.

ute of limitations. In addition to denying that any basis for estoppel is shown, the Government advances two arguments which would bar consideration of the plea.

The Government argues first that estoppel cannot be applied against it. It may be true that estoppel does not lie against the United States where its officers or agents, without authority, enter into agreements to do what the law does not sanction or permit. *E.g., Federal Crop Ins. Corp.* v. *Merrill,* 332 U.S. 380 (1947); *United States* v. *Stewart,* 311 U.S. 60, 70 (1940). Compare Maguire & Zimet, *Hobson's Choice and Similar Practices in Federal Taxation,* 48 HARV. L. REV. 1281, 1299 (1935). But when the conduct relied upon as the basis for estoppel is authorized, estoppel has often been applied against the Government by a number of courts, including this one.[3] Here,

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[3] *Stockstrom* v. *Commissioner of Internal Revenue,* 88 U.S.App.D.C. 286, 190 F.2d 283 (1951); *Vestal* v. *Commissioner of Internal Revenue,* 80 U.S.App.D.C. 264, 152 F.2d 132 (1945). Berger, *Estoppel Against the Government,* 21 U. CHI. L. REV. 680, 687-688 (1954):

> "However the case may be with respect to 'unauthorized' conduct, estoppel clearly may be based upon 'authorized' conduct. From the Supreme Court's oft-repeated formulation of the immunity from estoppel in terms of administrative action that 'the law does not sanction or permit,' it may be inferred that government is bound by actions within the scope of the agent's authority. A steadily growing number of federal courts have properly so held, for the sole tenable argument for the immunity derives from separation of powers considerations which have no play where administrative action is *authorized* by Congress. In such case the government should be and is estopped." (Emphasis in original.)

In holding that estoppel cannot be applied against the Government, the majority ignores these authorities. The statement in *Legerlotz* v. *Rogers,* 105 U.S.App.D.C. 256, 258 n.5, 266 F.2d 457, 459 n.5 (1959), relied on by the majority that estoppel does not lie against the Government, is dictum and arose in a context which clearly precluded application of the doctrine. The Attorney General had sent plaintiff a Notice of Intention to return a certain sum seized during the war, but later decided to retain a part of the sum involved. Plaintiff, allegedly in reliance upon the Notice, failed to bring suit within the two years prescribed by statute. But the

[fol. 93] admittedly, the officers who communicated with appellants and who formulated the policy which resulted in the 1958 offer and the 1963 settlement all acted within their authority.

The Government's second argument, that the 60-day limitation period for judicial review provided in the Act is "substantive" rather than "procedural" and therefore cannot be extended, is likewise unfounded. The suggestion seems to be that, since the limitation provision is included in the same Act which creates the right, the passage of time itself extinguishes the right. The Supreme Court rejected this argument in ruling that estoppel may prevent a private party from pleading the "substantive" limitation period of the Federal Employers' Liability Act. *Glus* v. *Brooklyn Eastern Terminal*, 359 U.S. 231 (1959). [fol. 94] See also *United States* v. *Price-McNemar Construction Co.*, 9 Cir., 320 F.2d 663 (1963) (estoppel applied in favor of the Government in Miller Act case despite "substantive" statute of limitations). More recently, also in tolling the FELA limitation period, the Supreme Court said: "[T]he 'substantive'-'procedural' distinction would seem to be of little help in deciding questions of extending the limitation period." *Burnett* v. *New York Central R. Co.*, 380 U.S. 424, 427 n.2 (1965). "[T]he basic inquiry is whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances." *Id.* at 427. Of course, Congress can make a limitation period inflexible, but in order to do so it must do more than merely place the limitation and the right in the same statute.

In deciding that the limitation period in FELA was not inflexible the Supreme Court, in *Burnett*, examined "the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the rights given by the Act." 380

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court pointed out that the statute specifically provided that a Notice of Intention conferred no right of action to compel the return of property; the provision's purpose was to leave the Attorney General with the power freely to change his mind.

U.S. at 427. These cases meet the test of *Burnett*. There are no problems of notice or proof. Appellants' claims, which the Government concedes are valid, were timely filed with the Custodian before 1949. The "Act itself" is remedial and humane. It was passed at the Custodian's urgent request, in part for the benefit of the Government, and was designed to return to rightful creditors on an equitable basis, rather than according to a "first come, first served" rule, assets kept out of enemy hands.[4] Both [fol. 95] Congress and the Custodian recognized the strong moral obligation owed to rightful creditors.[5] Certainly any application of equitable principle permissible under FELA, which is designed purely to benefit employees, is permissible here, where the Government also benefited, and where a strong moral obligation was recognized.

Moreover, there is nothing in the Act's "remedial scheme" which indicates congressional intent to limit or preclude equitable extension of the limitation period. Section 34(f)

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[4] The Supreme Court held, in *Markham* v. *Cabell*, 326 U.S. 404 (1945), that creditors or allies of enemies whose property had been seized by the Custodian during World War II may maintain suits against the Custodian on their debt claims under the Trading with the Enemy Act § 9(a), although that section appeared to apply only to World War I seizures. This resulted in a "first come, first served" rule—a race of creditors which exhausted properties without equitable distribution—and in serious interference with the use of the property to the best interests of the United States. Congress acted promptly. Within one year, § 34 was passed at the Custodian's urgent recommendation, providing for the equitable distribution of vested property by disallowing independent suits and by setting up a procedure whereby all claims could be considered and disposed of together. H.R.Rep. No. 2398, 79th Cong., 2d Sess. (1946).

[5] "The Custodian has emphasized to the committee that he is anxious to satisfy the proper claims of creditors and the committee concur in the view that there exists a strong moral obligation to satisfy them inasmuch as, but for the vesting of their debtors' property, they would presumably have been able to pursue ordinary remedies against the debtors." H.R.Rep. No. 2398, *supra* Note 4, at p. 10.

does set out the 60-day requirement, but this only poses the issue rather than answers it.[6] Neither does § 34(i), which provides that the sole relief for vested property claimants shall be that provided in the Act, indicate congressional intention to make the limitation period inflexible. This provision was designed only to prevent independent suits for recovery of property.[7] Speed in resolving all [fol. 96] claims was a matter of importance to Congress, but only as it related to the general purpose of effectuating an equitable distribution. Thus § 34(b) ordered the Custodian to fix "bar dates" within which debt claims could be filed, no later than two years from the date of vesting or of enactment. This enabled the Custodian to determine at one time which claimants were eligible, and to distribute each account equitably. Appellants complied with this fundamental requirement.[8] The 60-day limitation with which they failed to comply can hardly be said to constitute

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[6] The FELA provision, 45 U.S.C. § 56, if anything, is more absolute: "No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued."

[7] As pointed out *supra*, Note 4, passage of the present § 34 of the Act was generated by the Supreme Court ruling that creditors could sue, necessarily on a "first come, first served" basis, under § 9(a). The committee report makes clear that § 34(i) was passed to preclude § 9(a) suits:

> "Section 35(i) [now 34(i)] is generally procedural in nature. It provides that the debt claim provisions of the bill shall constitute the sole relief of creditors, except for their right to sue the original debtor or any other person liable. It is expressly provided that debt claim suits heretofore filed under section 9(a) shall not be continued and only suits to review the Custodian's determination under the bill are maintainable with respect to debt claims. This is believed necessary to the effective operation of the debt claim provisions of the bill. * * *" H.R.Rep. No. 2398, *supra* Note 4, at p. 15.

[8] It is upon non-compliance with the similarly fundamental requirement of § 33 of the Act that the cases cited by the Government are based. See, *e.g.*, *Brownell* v. *Morizo Nakashima*, 9 Cir., 243 F.2d 787, *cert. denied*, 355 U.S. 872 (1947).

a fundamental and inflexible part of the Act's remedial scheme.[9]

[fol. 97] Reiterating the old aphorism—"The failure to satisfy the conditions of the sovereign's consent to be sued is fatal to the court's jurisdiction"—the Government argues, however, that equitable principles may not be used to vary the literal terms of the sovereign's consent. But neither reason nor authority is advanced to show why the approach taken in *Glus* and *Burnett* in determining whether a "substantive" limitation period is inflexible should not apply in suits against the Government. In fact, *Burnett* cited with approval[10] *Osbourne* v. *United States*, 2 Cir., 164 F.2d 767 (1947), which involved claims against the Government under the Suits in Admiralty Act and against a private employer under the Jones Act. The court in *Osbourne* tolled the "substantive" limitation periods of both statutes without discussing any possible difference between them. If equitable principles may be applied to extend the limitation period for a claim against the Government which

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[9] The suppletive nature of the requirement makes it analogous to the 60-day reporting requirement in *N. V. Philips' Gloeilampenfabrieken* v. *Atomic Energy Com'n*, 114 U.S.App.D.C. 400, 316 F.2d 401 (1963). There, petitioners owned certain foreign patents which were divulged to the United States Government in connection with Project Manhattan and were widely used. The Patent Compensation Board rejected petitioners' claim for "just compensation" on the ground that petitioners had failed to file a report describing the processes of their inventions within 60 days of the passage of the statute conferring a right to compensation. We looked to the purpose of the requirement and found, not a mechanical reporting process, but a means for assuring disclosure. It was conceded that the A.E.C. had the relevant information. We concluded: "Under the circumstances of this case, the Commission should not be allowed to seize upon this technicality to avoid a responsibility which the Congress recognized." 114 U.S.App.D.C. at 408, 316 F.2d at 409. Since in these cases the Custodian knew of appellants' claims and could include them in his computations in equitably distributing the Yokohama property, the failure to file for review in time did not interfere with the basic purpose of the Act.

[10] 380 U.S. at 427.

would have to be satisfied from the federal treasury, as in *Osbourne*, no reason appears why such principles should not be applicable in suits against the United States where the claims are to be satisfied only from vested funds of the Yokohama Bank.

II

[fol. 98] The Government's opposition on the merits to the plea of estoppel is predicated on a rigid and mechanical approach to that doctrine. Estoppel is a "simple and wholly untechnical conception, perhaps the most powerful and flexible instrument to be found in any system of court jurisprudence." Statement of Sir Frederick Pollock, quoted in *Canada and Dominion Sugar Co. Ltd.* v. *Canadian National Steamships, Ltd.*, [1947] A.C. 46, 55. It should be neither rigidly circumscribed nor mechanically applied.[11] This does not mean courts are free to apply estoppel indiscriminately. The fundamental requirements —a representation, reliance, change of position, detriment —must be met.[12] But once these elements are present, the novelty of a particular case should not deter courts from using the device to do justice.

The facts of this case reveal a combination of circumstances and procedures which have operated to bring about a potential injustice of substantial proportion. Appellants all filed timely claims. They could have obtained the post-war ratio for their deposits at any time at the Yokohama Bank in Japan. They did not. Rather, they held on to their certificates of deposit, hoping their own government, applying the beneficent provision of the Act, would treat them more fairly. But in 1958, after waiting 12 years to cash their deposit certificates, the Custodian informed them their recovery would be limited to the post-war ratio.

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[11] Courts have refused to follow rigid definitions of the doctrine. See generally Berger, *op.cit.supra* Note 3; Dawson, *Estoppel and Statutes of Limitation*, 34 MICH. L. REV. 1 (1935); Lynn & Gerson, *Quasi-Estoppel Applied Against the United States in Federal Tax Controversies*, 19 TAX L. REV. 487 (1964).

[12] See 3 POMEROY, EQUITY JURISPRUDENCE § 805 (5th ed. 1941).

[fol. 99] Many of the appellants undoubtedly could not understand the Custodian's technical letter. But even if we assume they could, it seems certain the letter discouraged them from filing their certificates. The ratio offered rendered their small deposits almost completely worthless. A $500 creditor suddenly found he might be entitled to $10. Moreover, the letter pointed out that "[p]ayment of your claim, however, will not be made immediately," because it remained necessary to compile a Final Schedule (which took approximately three years). The letter then advised, however, that claimants could receive the same rate in Japan without going through as much trouble: "Under the circumstances, you may wish to utilize the funds in Japan rather than await settlement by this Office."

The 1958 letter unquestionably contained an authorized representation of fact—that it was the Government's position that payment should be made at the post-war rate. This representation was relied upon by appellants when they failed to file their certificates, knowing full well they could get the same rate at any time in Japan. The Government knew reliance might follow, and encouraged such reliance by suggesting Japan as an alternate, speedier source of funds. That only 1,817 of about 7,500 eligible claimants complied with the letter is strong evidence of its effect.

It turns out, however, that the Government's position changed. When the Supreme Court granted *certiorari* in *Aratani*, the Government settled the cases on a basis completely at variance with its original position. The power of the Government to take its 1958 position, and to change its position in 1963, is incontestible. But the exercise of this power cannot become a means, whether intentional or inadvertent,[13] whereby innocent persons who acted in reli-

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[13] See *Peters* v. *St. Paul Fire & Marine Insurance Company*, S.D. N.Y., 213 F.Supp. 441, 442 (1963):

> "Where one party induces another to delay in bringing suit so that an applicable period of limitation expires, he may be

[fol. 100] ance upon the Government's first representation should be denied the opportunity to recoup moneys which Congress wanted returned. The pattern of events—the letter which discouraged filing of certificates because of the position taken therein, the failure of the vast majority of claimants to file certificates, the subsequent change of position and settlement, the exclusion of appellants from the benefits of the change of position—could hardly have been better designed to secure exclusion of most claimants from the relief Congress afforded them, and from the relief to which the Office of Alien Property now apparently agrees they were always entitled.

We have here a remedial and humane piece of legislation designed to secure the equitable return of property to American citizens. The purposes of the limitation period have been satisfied, and nothing in the Act's remedial scheme limits or precludes equitable extension of the limitation period. The Yokohama Bank account, with over $10,000,000 in cash, has more than enough to pay appellants the same rate paid the claimants in *Abe*. Under these circumstances, the Government should not be permitted to assert the statute of limitations as a bar to the suit. Appellants should be allowed to take advantage of the Government's new position.

I respectfully dissent.

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estopped from asserting such expiration in defense even though the inducement to delay was done innocently or unintentionally. * * *"

See also *Romano* v. *Metropolitan Life Ins. Co.*, 271 N.Y. 288, 2 N.E.2d 661 (1936).

[fol. 101]

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1965

Civil 1630-64

No. 19,282

MASAE KONDO, et al., Appellants,

v.

NICHOLAS DEB. KATZENBACH, Attorney General of the United States, Appellee.

Civil 1591-64

No. 19,283

MASARU OKAMOTO, et al., Appellants,

v.

NICHOLAS DEB. KATZENBACH, Attorney General of the United States, Appellee.

Civil 1179-64

No. 19,284

AYAKO HONDA, et al., Appellants,

v.

NICHOLAS DEB. KATZENBACH, Attorney General of the United States, Appellee.

Appeals from the United States District Court for the District of Columbia.

Before: Danaher, Wright and Tamm, Circuit Judges.

JUDGMENT—January 13, 1966

These cases came on to be heard on the records on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

On Consideration Whereof, it is ordered and adjudged by this court that the orders of the District Court on appeal in these cases are affirmed.

Per Circuit Judge Tamm.

Separate dissenting opinion by Circuit Judge Wright.

[File endorsement omitted]

[fol. 102]

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1965

No. 19,282

[Title omitted]

No. 19,283

[Title omitted]

No. 19,284

[Title omitted]

Before: Bazelon, Chief Judge; and Fahy, Danaher, Burger, Wright, McGowan, Tamm, and Leventhal, Circuit Judges, in Chambers.

[File endorsement omitted]

[fol. 103] ORDER—Filed February 24, 1966

On consideration of appellants' petition for rehearing *en banc*, it is

Ordered by the court *en banc* that appellants' aforesaid petition is denied.

Per Curiam.

Circuit Judge Wright would grant appellants' aforesaid petition.

[fol. 104] CLERK'S CERTIFICATE TO FOREGOING TRANSCRIPT (omitted in printing).

[fol. 105]

SUPREME COURT OF THE UNITED STATES

No. 164—October Term, 1966

AYAKO HONDA, et al., Petitioners,

v.

NICHOLAS DEB. KATZENBACH, Attorney General of the United States.

ORDER ALLOWING CERTIORARI—October 24, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

AYAKO HONDA, ET AL., AND MASAE KONDO, ET AL., *Petitioners,*

v.

NICHOLAS DeB. KATZENBACH, ATTORNEY GENERAL OF THE UNITED STATES, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No.

AYAKO HONDA, ET AL., AND MASAE KONDO, ET AL., *Petitioners,*

v.

NICHOLAS DeB. KATZENBACH, ATTORNEY GENERAL OF THE UNITED STATES, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners, numerous Japanese-American citizens seeking an OAP return of their savings accounts from assets of the Yokohama Specie Bank, Ltd. seized on Dec. 7, 1941, pray that a writ of certiorari issue to review a final judgment of the United States Court of Appeals for the District of Columbia holding their suit barred by the 60-day statute of limitations of Section 34(f) of the Trading with the Enemy Act.

Opinion Below

The majority and dissenting opinions in the Court of Appeals for the District of Columbia, issued on January 13, 1966, are reported at 356 F. 2d 351 and appear *infra* in the Appendix at pp. 17 to 45.

Jurisdiction

The opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on January 13, 1966, and a timely petition for reconsideration was denied by order of February 24, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Question Presented

The court below denies thousands of Japanese-American citizens return of their seized savings deposits because of the Government's plea of a 60-day statute of limitations, despite the fact that the Government long ago recognized their right to repayment and has the funds available therefor. The question thus presented is whether, in a suit under the Trading with the Enemy Act, federal courts are jurisdictionally precluded from applying equitable estoppel or tolling against the Government's limitations plea in circumstances where such a limitations plea by a private litigant would be estopped to prevent a fundamental injustice.

Statute Involved

The pertinent portions of Section 34 of the Trading with the Enemy Act are set forth *infra* at pp. 31-32.

Statement

It is a rare case wherein a federal Court of Appeals concedes the presence of manifest injustice but finds itself without authority to cure it. This is such a case. In the

same breath the majority opinion below recognizes that "unique and unfortunate circumstances which have deprived these appellants of their deposits in the Yokohama Specie Bank command sympathetic consideration of their problem," and then finds federal courts powerless to prevent the injustice by estopping or tolling the 60-day statute of limitations of the Trading with the Enemy Act.

The lower court thereby leaves divested of judicial redress thousands of Japanese-Americans seeking a return of their California savings accounts seized on Pearl Harbor Day, even though their debt claims have long been recognized by the Government as valid and the funds are on hand for their payment. The court's self-denying ordinance causes American citizens to forfeit their right to an alien property return because in 1961, 20 years having elapsed after Pearl Harbor Day before the Government finally adjudicated their claims, petitioners delayed more than 60 days in filing suit against the Department of Justice while awaiting resolution of the yen-dollar ratio issue then pending in litigation. See *Aratani* v. *Kennedy*, 317 F.2d at p. 161; No. 321, October Term 1963.

In 1963 the Court of Appeals' *Aratani* ruling upheld the application of the post-war yen-dollar conversion ratio to Sumitomo Bank savings accounts seized on Pearl Harbor Day, thus limiting return to 2 cents on the dollar. But following the grant of certiorari by this Court (375 U.S. 877), the Government entered into a multi-million dollar settlement with the Sumitomo Bank plaintiffs in *Aratani* and Yokohama Bank claimants in the companion case of *Abe* v. *Kennedy*, which this Court referred to the District Court for approval (376 U.S. 936). That settlement, effected in 1964 (228 F. Supp. 706; see 380 U.S. 938), represented a distribution to each *Abe* claimant of one hundred percent of his yen account at the pre-war yen-dollar ratio, but without interest. Prior to the *Abe* settlement with Yoko-

hama Specie Bank claimants, petitioners in the case at bar had filed timely Yokohama claims which OAP had recognized as valid, had awaited the resolution of that litigation, and had expected to be given the benefit of a successful outcome thereof. After the *Abe* settlement petitioners promptly asked the Department of Justice to honor their claims on the same basis (100% of principal, without interest) on which it had settled in *Abe*. They pointed out that the Government had long ago recognized the validity of their debt claims, that Yokohama Specie Bank assets in the possession of the Government are adequate to afford them the same return given in *Abe*, and that fundamental justice requires equal treatment for all similarly situated depositors. *And they pointed out further that the Government, having withdrawn the test case from this Court's jurisdiction after certiorari had been granted, could reasonably have been expected to resolve the entire issue of Japanese savings accounts and not subject the Court to further consideration of the issue at a subsequent date.*[1]

However, the Government, though it concedes the power and has the funds to make a return to these claimants, declined their 1964 request to do so. Thereafter, it successfully resisted the jurisdiction of federal courts to entertain the petitioners' District Court suit on the single ground that they did not in 1961, when the OAP's Yokohama Specie Bank schedule was published, file suit within the sixty day limitation period of the Trading with the

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[1] Petitioners also emphasized to the Department of Justice, but without avail, their superior equities as contrasted with the claimants in the Interhandel case. Following this Court's procedural reversal in that case (*Societe Internationale* v. *Rogers*, 357 U.S. 197), the Government entered into a multimillion dollar settlement with the alien claimants, denying to the end their substantive eligibility for a return. By contrast, in the present case the Government has declined to make a return to numerous American citizens it has long ago deemed eligible for return, of the amounts representing their modest savings on deposit in California banks at the time the war commenced.

Enemy Act. We set forth below the sequence of events which have culminated in the ruling below that federal courts are jurisdictionally precluded from achieving an equitable result by estopping or tolling a limitation period pleaded by the Federal Government.

1. *Seizure and Vesting.*

Petitioners are thousands of residents and citizens of the United States, persons of Japanese ancestry, who had individual yen deposit accounts in 1941 in the California Branch of the Yokohama Specie Bank, Ltd. Their yen certificates, issued in the United States in exchange for dollar deposits, were redeemable in dollars at the Bank in the United States or in yen at the Bank's offices in Japan (J.A. 1). On December 7, 1941, California seized the domestic assets of the Yokohama Specie Bank as enemy property, and in 1943 those assets, including the funds petitioners had on deposit, were "vested" pursuant to Section 34 of the Trading with the Enemy Act.

During the war, while their savings accounts remained "frozen" and unavailable, most of the petitioners were evacuated from California to work as farm laborers.[2] Illustrative is the case of petitioner Michiko A. Terao, whose affidavit discloses (J.A. 15) that although she was the wife of a member of the United States Army who was wounded in battle, awarded the Purple Heart, and became permanently paralyzed by his battle injuries, during the war she was evacuated to Colorado with minimum personal belongings to work as a sharecropper. After the War, administrative delays consumed fifteen more years before the final

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[2] For accounts of the mistreatment of the Japanese-Americans by the Government during the War, see *Ex Parte Endo*, 323 U.S. 283; *Acheson* v. *Murakami*, 176 F. 2d 953 (CA 9 1949); *Hirabayashi* v. *United States*, 320 U.S. 81; Grodzins, *Americans Betrayed* (Univ. of Chicago Press, 1949); cf. *Takeguma* v. *United States*, 156 F. 2d 437, 442 (CA 9 1946).

OAP adjudication in 1961 that Mrs. Terao's fellow-claimants could have a return of their savings account at the 2% post-war yen-dollar conversion rate. That formula would have afforded Mrs. Terao about 70 cents on her 220 yen deposit which had an actual value on Pearl Harbor Day of approximately $50.00 (J.A. 15). Ultimately, after this Court granted certiorari in *Aratani*, the Government changed its position and granted those claimants who had sued in 1961 to challenge the 2% return ratio their full original yen deposits in the Yokohama Specie Bank. But it took the position that Mrs. Terao (like her thousands of fellow petitioners before this Court) is precluded from a like return because she did not separately sue in 1961 to challenge the Government's 2% formula.

2. *The 20-year Administrative Delay*

When Congress amended the Trading with the Enemy Act in 1946, some 7,500 yen deposit holders in the Yokohama Specie Bank, including petitioners herein, thereupon filed timely debt claims under Section 34 of the Act, based upon their 1941 deposit accounts in the Yokohama Specie Bank (J.A. 2, 25). Thereafter, many years passed before the Government made its determination on their claims. During these years, the test case in the Department of Justice on the Yokohama claims was that of *Kunio Abe*, Claim No. 55507. Therein, a Hearing Examiner ruled on January 31, 1957, that the claims were to be honored by the Custodian at the pre-Pearl Harbor conversion ratio of approximately four yen to the dollar. However, later in 1957 the Director of the OAP, with the approval of the Attorney General, overruled the Examiner and held that the proper payment formula was the post-war conversion ratio of 361 yen to the dollar—approximately two percent of the actual value of these deposit accounts when they were seized on Pearl Harbor Day (J.A. 2).

Following that determination, in 1958 identical or very similar letters were sent to each of the 7,500 Yokohama Specie Bank claimants (see *infra*, p. 33), wherein the Government recognized the validity of the applicant's claim but offered to pay only at the post-war ratio of 361.55 yen per dollar. For most of the claimants, whose deposit accounts were modest, this 1958 offer of return actually was a proposal to pay only a few dollars or even pennies—frequently less than what it had cost the claimant to file the original claim with an authenticated copy of his yen deposit certificate. See J.A. 12, 13, 16.

Discouragement and insult inhered in the two percent offer to thousands of honorable Americans who had then waited seventeen years for a return from assets their government had seized. And there was added in the OAP letter the gratuitous and arbitrary demand of the Government for the surrender of the claimant's original deposit certificates. Even cursory reading of that letter (*infra*, p. 33) demonstrates the confusion, insult and arbitrariness of the Government's peremptory 1958 demand for surrender of original deposit certificates upon its offer of a 2% return on the claimant's 1941 savings deposit.[3]

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[3] The 1958 letter nowhere explained why the certificate surrender was being demanded. Seventeen years had then passed since the seizure of the claimants' bank deposits in California; ten years earlier each claimant had filed a certified claim, usually by photostatic copy of the yen deposit certificate, and no question about the authenticity of the yen deposit claim was being raised. Moreover, the Government was not even in 1958 offering actually to make payment, but merely advising each claimant that at some undetermined future time a schedule would be published of accepted claims, long before any payments could be made.

Moreover, the demand for the original certificates was made in conjunction with a discouraging and insulting offer to return the claimants' seized bank accounts at two percent of value, years after their seizure occasioned by no act of the claimants but only because of the state of war between the United States and Japan.

Finally, the offer to the claimants was utterly confusing on the question whether the original certificates were being demanded only from those who would accept the two percent return or also those who rejected it.

The recipients of the 1958 letter were naturally reluctant to surrender their original deposit certificates. Thus, of the 7,500 Yokohama claimants, about 1,800 sent in their original deposit certificates as requested, fewer than 1,600 returned a card attached to the letter indicating that they were withdrawing their claim, and the remainder—*the majority*—neither withdrew their claims nor sent in their original certificates. These latter claimants are petitioners before this Court. They feared to surrender their original certificates constituting their last tangible evidence of claim, reasonably believed that such surrender would constitute acquiescence in a two percent return, and because of illiteracy, poor command of English and similar reasons many simply did not understand the complex 1958 letter of instructions from the OAP (J.A. 2, 3, and see affidavit of Katsuma Mukaeda, President of the Japanese Chamber of Commerce of Southern California, J.A. 18).

In due course, after failure to receive his deposit certificate, a notice was sent by the Government to each petitioner advising that his claim was dismissed but that under the Act he had no judicial recourse until after future publication of the Alien Property schedule of validated Yokohama Specie Bank claims.

3. *The 1961-1964 Litigation*

In 1961 the OAP's Yokohama Specie Bank debt claim schedule was finally published, twenty years after seizure of the bank's California assets. Within sixty days following the publication of that schedule, a suit was filed in the U.S. District Court for the District of Columbia challenging

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Whatever may have been intended on this score, the failure to explain in the 1958 letter the Government's need for the original deposit certificates, coupled with the confusing attempted explication of litigation rights with respect to the two percent return offer, led to the natural inference by the reader that a surrender of the original deposit certificate would or might constitute acquiescence in the two percent formula, and thus waive further rights of the claimant.

the post-war conversion formula of 2% return. *Abe* v. *Kennedy*, Civ. Action 2529-61. The suit was brought on behalf of all of the Yokohama Specie Bank claimants appearing on the 1961 OAP schedule and the first named litigant was Kunio Abe, whose claim had been the test case within the Justice Department for all of the Yokohama claimants. Petitioners, however, did not understand the technical difference between claimants on the 2% schedule and those dropped because of failure to send in their original certificates (J.A. 2, 18). Moreover, they reasonably anticipated that if the two percent formula which had long been in administrative litigation in *Abe* were reversed in the courts in the *Abe* suit, all Yokohama Bank depositors who had filed timely claims under the Act which the Government had recognized as valid in 1958 would be similarly compensated.

That expectation has, however, been frustrated *by the refusal of the Government in 1964 to make the same return to petitioners*—the majority of the Yokohama Bank claimants—*as it granted the Abe plaintiffs in a settlement following this Court's grant of certiorari.* After the Court of Appeals in *Aratani* upheld the post-war conversion ratio, this Court granted certiorari (375 U.S. 877). Thereupon the Government settled *Abe* and *Aratani*, mooting the issue before this Court. The settlement gave each Yokohama Specie Bank claimant represented in *Abe* approximately one hundred percent of his original deposit account (without interest) at the 4 to 1 yen-dollar ratio obtaining on Pearl Harbor Day (J.A. 3-4). Yet, when the Government was asked in 1964 to make the same return to petitioners as to the *Abe* plaintiffs, it refused to do so though it has adequate Yokohama Specie Bank assets on hand to make the same return to all the remaining claimants (J.A. 4) and has judicially conceded the power to do so.[4]

[4] The Government's reason for refusal is not precisely clear. In the courts below the Government recognized the equities favoring petitioners'

4. *The Litigation Below*

Following the Government's refusal to award the benefit of the *Abe* return formula to claimants who had not transmitted their original deposit certificates in 1958, petitioners filed this action under Section 34 of the Trading with the Enemy Act in 1964 (J.A. 1, 41). The Government countered by pleading the sixty-day statute of limitations proviso of that Section. It urged in the courts below that however reasonable petitioners' conduct may have been in withholding litigation while the *Abe* case was pending in the courts, the sixty days for suit expired in 1961 and the federal courts thereby lost jurisdiction.[5]

Petitioners' principal argument below was that the District Court has power to bar the Government's plea of

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case, and implied in the District Court its willingness to support legislation authorizing the payment of their claims. But apparently the Government is disinclined administratively to honor petitioners' claims despite these equities because of the delay which the process of payment might cause in the long-sought liquidation of the Office of Alien Property—a bureaucratic answer to a human injustice.

[5] Petitioner Kondo differs from the class of petitioners represented by petitioner Honda only in that she received neither the 1958 letter from the Government requesting surrender of her original certificate nor the 1959 notice that her claim had been dismissed (J.A. 42). The reason for this was that the Government had mis-addressed those two communications (J.A. 47). Moreover, having failed to furnish the Government with a change of address notice, Mrs. Kondo also did not receive the 1961 Yokohama Bank schedule which was mailed to an address where she then no longer resided. Nevertheless, adhering to its statute of limitations argument to the point of *reductio ad absurdum*, the Government argues that if Mrs. Kondo had given notice of change of address she would have received the 1961 schedule which, *standing alone*, would have been adequate statutory notice to commence running of the sixty-day limitation of Section 34(f). Accordingly, the Government has refused to honor Mrs. Kondo's 1964 request for a return and those of others similarly situated. With respect to these claims it is the Government's position that having seized the property of loyal Americans during the war, it may forever preclude return twenty years later to a claimant who did not sue within 60 days in 1961, even though the Government's own carelessness deprived the claimant of receipt of notice that her claim had been dismissed.

limitations under the doctrine of equitable estoppel recently confirmed in *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, or the doctrine of tolling, as in *Burnett v. N.Y. Central R. Co.*, 380 U.S. 424, where no statutory purpose is served by applying limitations. Petitioners urged that traditional grounds for estoppel or tolling inhere in three considerations bearing upon their failure to sue between 1961 and 1964:

1. It was pointed out that petitioners, who had awaited the outcome of the *Abe* case, differed from the plaintiffs in *Abe only* in their failure to comply with the Government's wrongful demand: the confusing, insulting, and arbitrary 1958 demand for the surrender of original deposit certificates in connection with a legally inadequate offer of a two percent return.

2. It was emphasized that petitioners were fully justified in declining to surrender their original deposit certificates in 1958, and that their failure to sue while *Abe* was in litigation was *excusable delay* in view of their reasonable reliance upon the Government to treat them equally with their fellow-claimants in *Abe*.

3. It was also urged there was *no prejudice* whatsoever from delay in suit between 1961 and 1964, since the vested fund to which petitioners look for return had simply remained dormant in the possession of the Government, just as it had for the preceding twenty years.

Petitioners also urged in the courts below that, where the obligation of suit arises in the first instance from summary Government seizure of private property without judicial process, a serious Fifth Amendment issue arises if Congress is deemed to have precluded any equitable extension or tolling of the 60 day limitation of the Act (see *infra*, pp. 15, n. 7; 27).

5. *Rulings Below*

Notwithstanding the strong equities presented, the District Court dismissed the petitioners' action for lack of jurisdiction (J.A. 36, 66), accepting the Government's argument that because of "sovereign immunity," estoppel against limitations does not lie under an act authorizing suit against the Federal Government. Dividing 2 to 1, a panel of the Court of Appeals below has affirmed the District Court's ruling on the ground that "estoppel cannot be used against the Federal Government" (*infra*, p. 25). The majority opinion additionally suggests that equitable estoppel requires a representation or mis-representation by one party and reliance thereon by the other, and finds no misrepresentation by the Government in its dealings with the petitioners.

A detailed critique of that ruling in the dissenting opinion of Judge Wright (*infra*, pp. 36 to 45), emphasizes that this Court's decision in *Burnett* v. *N.Y. Central R. Co.*, 380 U.S. 424, applies much broader principles of equity for estoppel or tolling of limitations. And it points out that in fact the Government represented to all Yokohama Specie Bank claimants in 1958 that no more than 2% was available on a return of yen savings accounts, and that petitioners are seeking to rely upon the change of the Government's position in 1964 when it settled with their fellow claimants in *Abe* at 100% of principal following this Court's grant of certiorari on the conversion rate issue. Judge Wright reviews the authorities demonstrating the error of the majority opinion's view that federal courts cannot invoke estoppel against the Federal Government.

Reason for Granting the Writ

We urge as the reason for the granting of the writ in this case, that in denying judicial power to estop or toll a limitations plea by the Federal Government, the court

below has decided a manifestly important federal issue in conflict with this Court's governing authorities and has thus inflicted one more obvious injustice upon thousands of loyal Japanese-Americans.

In this case the most elementary consideration of justice calls for judicial preclusion of the application of limitations. There has *never been any question* about petitioners' statutory eligibility for an alien property return, which the Government recognized as long ago as 1958 and again in its 1964 settlement with petitioners' fellow-claimants; thus, application of the Act's 60 day litigation bar in this case serves no statute of limitations purpose of protecting a party from having to "defend" against old claims, and simply divests citizens of their conceded statutory rights.

In *Glus* v. *Brooklyn Eastern Terminal*, 359 U.S. 231, where a fundamental injustice would otherwise have derived from the defendant's own conduct, this Court ruled that equitable estoppel is available against the plea of a federal statute of limitations. More recently, in *Burnett* v. *N.Y. Central R. Co.*, 380 U.S. 424, where unusual grounds were presented for entertaining an action filed after the Congressionally-stipulated limitation period, this Court ruled that "the basic inquiry is whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances," and permitted judicial tolling of a federal limitation. But the majority opinion in the court below finds inapplicable to the Government the estoppel rule invoked in *Glus* and the tolling applied in *Burnett*, adhering to a general stricture in an earlier opinion of the D.C. Circuit that "*estoppel cannot be used against the Federal Government*" (*infra*, p. 25).[6]

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[6] Contrary to its present view, the District of Columbia Court of Appeals previously permitted estoppel to be invoked against the Government in *N. V. Philips' v. A.E.C.*, 114 App. D.C. 400, 316 F. 2d 401; *Stockstrom* v. *Commissioner*, 88 App. D.C., 286, 190 F. 2d 283, 289; and *Vestal* v. *Commissioner*, 80 App. D.C. 264, 152 F. 2d 132, 136; and in

Although it recognizes the strongest equities for a contrary result in this case, the majority below finds no judicial power in a suit against the Federal Government to "extend" the statutory limitations period by estoppel or tolling. Noting (*infra*, p. 30) the "unique and unfortunate circumstances which have deprived these appellants of their deposits in the Yokohama Specie Bank" (which are deemed to command "sympathetic consideration"), the majority opinion goes on to rule (*infra*, p. 30) that nevertheless federal courts may not extend a statute of limitations pleaded by the Federal Government "in order to accomplish an end which is suggested by a desire to accomplish a humane objective." The majority opinion concludes by suggesting that Congress should provide relief to these petitioners by amending the Trading with the Enemy Act.

In exempting the Federal Government from estoppel and tolling principles generally prescribed by this Court's recent rulings, the decision below invokes a manifestly important federal question. Final resolution of that question will affect litigation under a wide variety of important federal statutes, for nothing in the ruling below suggests that its self-denying view was confined or could be limited to the Trading with the Enemy Act. No legislative history or purpose of that Act is cited by the court to set it apart from other statutes permitting suit against the Federal Government and its agencies. Accordingly, the thrust of the ruling below that "estoppel can not be used against the Federal Government", is *generally* to exempt the Government in civil litigation from estoppel and tolling rules applicable to private party defendants.

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the latter case it expressly stated: *". . . estoppel must be applied with great caution to the Government and its officials. But in proper circumstances it does apply."*

Moreover, the self-denying ordinance below comes from the Court of Appeals with the greatest preponderance of litigation involving the Government. Congress has made the District of Columbia the generally available alternative forum—in some cases the exclusive forum—for suit against the Federal Government; and because of the necessities of service upon high government officers the District of Columbia tends to be the principal forum for suits against Federal agencies and officers. Certainly, under these circumstances the ruling exempting the Government from limitations estoppel or tolling raises an important federal question which this Court should not leave unresolved.

Finally, it is also clear that the ruling below conflicts with this Court's decisions. In exempting the Government alone from judicial estoppel and tolling power available against other defendants, the ruling contravenes this Court's repeated view that government is to be held to the *highest* rather than to diminished standards of fairness in the adjudicative process. See, e.g. *Communist Party* v. *S.A.C.B.*, 351 U.S. 115; *Wong Yang Sung* v. *McGrath*, 339 U.S. 33; *Speiser* v. *Randall*, 357 U.S. 513; *Brady* v. *Maryland*, 373 U.S. 83. Indeed, this Court's landmark ruling in *Central Union Trust Co.* v. *Garvan*, 254 U.S. 554, 566, upheld summary alien property seizure only "*if adequate provision is made for a return in case of mistake.*" Cf. *Societe Internationale* v. *Rogers*, 357 U.S. 197, 210-211. For "adequate provision for a return", the ruling below substitutes an inexorable 60-day bar upon a return, under conditions concededly causing a harsh and inequitable divestiture for thousands of guiltless Japanese-Americans.[7]

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[7] Petitioners urged below that a serious Fifth Amendment issue would be presented if Congress has in fact precluded judicial jurisdiction to estop or toll the 60-day limitation period of the Act where justice and equity otherwise would require such an extension. ". . . it has been held that statutes of limitations must give a party a reasonable time to sue,

Our elaboration of the conflict between the ruling below and this Court's decisions would be redundant, for the dissenting opinion in this case by Judge J. Skelly Wright fully reviews that conflict (see Appendix, *infra* at pp. 36 *et seq.*). We tender its analysis as the remainder of the demonstration to this Court on the reasons for the grant of review.

Conclusion

It is respectfully submitted that the writ should be granted.

Respectfully submitted,

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and if a particular statute should fail to do so it would be within the competency of the courts to declare the same unconstitutional and void." *Campbell* v. *City of Haverhill*, 155 U.S. 610, 615. Under the "just compensation" proviso of the Amendment as well as the due process guarantee, the Government's summary seizure of private property, and its 20 year delay in ruling upon rights of return, become constitutionally impaired if the citizens' right to a return can then be reduced to an unalterable requirement, notwithstanding excusable reasons for delay, for suit within 60 days upon pain of divestiture. After all, this is not the ordinary area of suit against the sovereign, but a case arising from the sovereign's summary seizure of private property. The Constitution must certainly impose some limits upon arbitrary and unreasonable conditions or litigating burdens for the citizen seeking recapture of property taken by government without judicial process.

APPENDIX: Opinions and Judgment Below

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,282

MASAE KONDO, et al., *Appellants*,

v.

NICHOLAS deB. KATZENBACH,
Attorney General of the United States, *Appellee*.

No. 19,283

MASARU OKAMOTO, et al., *Appellants*,

v.

NICHOLAS deB. KATZENBACH,
Attorney General of the United States, *Appellee*.

No. 19,284

AYAKO HONDA, et al., *Appellants*,

v.

NICHOLAS deB. KATZENBACH,
Attorney General of the United States, *Appellee*.

On Appeals from the United States District Court for the District of Columbia

Decided January 13, 1966

Mr. John Silard and *Mr. Fred Okrand* of the bar of the Supreme Court of California, *pro hac vice*, by special leave of court, with whom *Messrs. Joseph L. Rauh, Jr.*, and *A. L. Wirin* were on the brief, for appellants.

Mr. David L. Rose, Attorney, Department of Justice, for appellee. *Mr. John W. Douglas, Assistant Attorney General* and *Messrs. Sherman L. Cohn, Anthony L. Mondello* and *Armand B. DuBois*, Attorneys, Department of Justice, were on the brief, for appellee.

Before: DANAHER, WRIGHT and TAMM, *Circuit Judges*.

TAMM, *Circuit Judge*:

I

Presented to us in these cases, consolidated for hearing, is a precise question: Did the District Court correctly dismiss the appellants' complaints on the ground that the court lacked jurisdiction of the subject matter of the actions because the complaints were not filed within the 60-day limitation period prescribed by section 34(f) of the Trading with the Enemy Act (60 Stat. 925, 50 U.S.C. App. § 34(f))? (See Appendix A at 17-18.)

The three actions under review were filed in the District Court in May and July of 1964 and seek to set aside the dismissal by the Attorney General of appellants' debt claims based upon their deposits of yen in the American branches of the Yokohama Specie Bank, Ltd. Except for the claimant internees or parolees in No. 19,283, appellants are several thousand Americans of Japanese ancestry who, residing in the United States, had, prior to December 7, 1941, made deposits in the American branches of the Yokohama Specie Bank, Ltd. The property in the United States of this Japanese bank was vested as Japanese Enemy Property under the Trading with the Enemy Act, 50 U.S.C., App. § 1. After liquidation by state superintendents of banks, there remained approximately $17 million, which was turned over to the Office of Alien Property.

Congress, on August 8, 1946, enacted section 34 of the Trading with the Enemy Act, which authorized the Alien Property Custodian[1] to pay from the proceeds of vested property the debts of former owners of the vested property that were due and owing on the vesting date. Congress excluded from the benefits of this statute, among others, individuals and their successors who had been interned or paroled as potentially dangerous alien enemies under the Alien Enemy Act, 50 U.S.C. § 21.

Acting under section 34(b) of the Trading with the

[1] By Executive Order No. 9788 (October 14, 1946, 11 F.R. 11981), the Attorney General succeeded to the powers and duties of the Alien Property Custodian. The term "Custodian" or "Office of Alien Property" will be used to refer to the Alien Property Custodian, or the Attorney General as successor, as the context may require.

Enemy Act, the Alien Property Custodian fixed November 18, 1949, as the final date for filing debt claims with the Custodian against the funds of the Yokohama Specie Bank, Ltd. Approximately ten thousand debt claims were timely filed, of which some seven thousand, five hundred were based on yen deposits. Appellants in the present cases all filed claims in the amount of their deposits during this period. The aggregate of the claims exceeded the seized assets of the bank, necessitating a processing of the claims under section 34(f) of the Act relating to insolvent debtors' estates. Claims of persons who had been interned or paroled under the Alien Enemy Act (50 U.S.C. § 21) were dismissed because of the express provision of section 34(a) of the Trading with the Enemy Act (see Appendix A at 16-17), which excluded such persons from the status of eligible debt claimants. This action constituted the final disposition under the Act of the claims of the appellants in case number 19,283.

Extensive hearings before an Examiner were conducted, and ultimately, in 1957, the Alien Property Custodian ruled that the claims were allowable at the post-war rate of exchange of 361.55 yen to the dollar under the "Judgment Day" rule of *Deutsche Bank* v. *Humphrey*, 272 U.S. 517 (1926), since the deposits were payable in yen in Japan. Thereafter, identical registered letters were sent to all eligible claimants,[2] numbering some seven thousand, five hundred, stating that their claim could be allowed at the 361.55 rate and requesting that the claimants' original yen certificates be submitted to the Office of the Alien Property Custodian. This letter was received by all appellants represented in cases number 19,282 and 19,284. The claims of appellants in case number 19,283 had been rejected initially, as heretofore indicated, and they were not recipients of the letter. A copy of the registered letter appears in Appendix B of this opinion.

Some further summation of the contents of the letter received by the claimants is essential to a consideration of the contentions of appellants in the *Honda* (No. 19,284)

[2] The record also indicates that counsel of record for at least claimant Ayako Honda, No. 19,284, was sent a copy of this letter.

and *Kondo* (No. 19,282) cases. The letter, in addition to the provisions set forth above, informed these appellants that they might, if they wished, file a statement of their objections to the application of the 361.55, or post-war, rate of exchange. The letter informed claimants that if their original certificates were not submitted within the designated period, or if an explanation of why the certificates could not be submitted was not timely submitted, the claim would be dismissed as having been abandoned. The letter also set forth that a schedule of claimants would be drawn up from the names of persons submitting their original deposit certificates or explanations. Included in the letter was the statement that "[w]ithin sixty days after the issue of the schedule any aggrieved claimant may file in the District Court of the United States for the District of Columbia a complaint for review of such schedule, naming the Attorney General as defendant. If no complaint for review is filed, payments will be made in accordance with the schedule."

Thereafter, one thousand, eight hundred seventeen deposit claims against the Yokohama Specie Bank, for which either original certificates of deposit or satisfactory evidence of loss had been submitted, were allowed at the rate of 361.55 yen to the dollar. Carrying out the provision of section 34(f) of the Act (see Appendix A at 17-18), the Alien Property Custodian prepared and served by registered mail on all claimants (*id est*, allowed and dismissed claims and including claimants in cases 19282, 19283 and 19,284) a Final Schedule of all debt claims allowed and the proposed payment to each claimant. Claimants whose claims had been dismissed, including appellants in the *Okamoto* case (No. 19,283) were not listed on the Final Schedule. Included with the notice transmitting the Final Schedule to each claimant was the statement:

> "Pursuant to Section 34(f) of the Trading with the Enemy Act, as amended, any claimant considering himself aggrieved by this Final Schedule may, within sixty (60) days from the date of the mailing of the

Schedule, file in the United States District Court for the District of Columbia a complaint for review of this Schedule, naming the Attorney General as defendant. A copy of such complaint must be served on the Attorney General and on each claimant named in the Schedule. If no such complaint for review is filed within the sixty-day period, payments to claimants will be made by this Office as specified in the Final Schedule."

A timely complaint for review of the award was brought in the United States District Court for the District of Columbia in 1961 asserting that the claims should have been allowed by the Custodian at the pre-war dollar rate of exchange for yen. This action (*Abe* v. *Kennedy*, C.A. 2529-61) was pursued in behalf of all Yokohama Specie Bank yen deposit claimants whose claims had been allowed on the Final Schedule. Proceedings in the *Abe* case were postponed, however, pending the outcome of a companion case, *Aratani* v. *Kennedy*, C.A. 3164-58, which had been filed in 1958 and which related to the yen deposit claims which had been asserted against vested funds of the Sumitomo Bank, Ltd. The chronology and disposition of this case are set forth in the court's opinion published in 115 U.S. App. D.C. at page 97 and in 317 F.2d at page 161. The opinion affirming summary judgment in favor of the Government certainly invited *certiorari*, and on October 21, 1963, the Supreme Court granted certiorari, 375 U.S. 877. Before disposition by the Supreme Court, however, the Attorney General settled the Sumitomo Bank, Ltd. case on an exchange rate much more favorable to the claimants and simultaneously, or virtually so, settled the yen deposit claims on the Final Schedule of the Yokohama Bank case at a rate approximating a net return to the claimants of 49 per cent of the amount claimed. The settlements were approved in the United States District Court for the District of Columbia on May 18, 1964,[3] 228

[3] The Supreme Court thereafter dismissed the writ of *certiorari* in the *Aratani* case on March 9, 1965, 380 U.S. 938.

F. Supp. 706. After payment of the settlement sums, about $10 million remains in the Yokohama Specie Bank, Ltd. account in the Office of Alien Property.

Against this background, the identity of the appellants in our present cases comes into sharper focus. In the *Kondo* (No. 19,282) and *Honda* (No. 19,284) cases, we have before us several thousand depositors in the Yokohama Specie Bank who, although recipients of the notices heretofore described as issuing from the Alien Property Custodian, declined or failed to file their original deposit certificates with the Custodian. Whatever reasons may have prompted or caused this action, these depositors were not listed on the Final Schedule for payment, were not represented in the court action entitled *Abe* v. *Kennedy, supra,* and were not included in the settlement effectuated by the District Court approval of May 18, 1964. By actions filed in the District Court in the *Honda* case on May 19, 1964, and in the *Kondo* case on July 9, 1964, these appellants sought to compel the Attorney General to pay to them on their deposits in the Yokohama Specie Bank a pro rata amount from the funds remaining in the Bank's vested account upon the same basis as was paid to the claimants in the *Abe* case. Similarly, in the *Okamoto* case, No. 19,283, in a complaint filed in the District Court on July 6, 1964, appellants, as depositors in the Yokohama Specie Bank whose claims were disallowed on the ground that they had been interned and paroled as alien enemies, seek a like portion of the remaining vested funds.

The District Court, on March 31, 1965, dismissed all three actions on the ground that the court lacked jurisdiction over the subject matter of the actions because they were not commenced within the time set forth in section 34(f) of the Trading with the Enemy Act (50 U.S.C. App. § 34(f)).

II

Appellants in the *Kondo* and *Honda* cases contend that the District Court should have invoked equitable estoppel against the 60-day limitation period; that estoppel is applicable to suits arising under the Trading with the

Enemy Act; that the sovereign immunity doctrine contains nothing warranting an implied exemption for the Government from the estoppel principle of *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959); and exemption from the *Glus* estoppel doctrine creates a constitutional issue under the just compensation provisions of the Fifth Amendment. We treat first the presentation of these appellants.

III

Basing their first argument on a chronological treatment of the events transpiring between December 7, 1941 and March 31, 1965, these appellants argue that the 1958 letter of the Custodian to each claimant was a "discouragement" and "insult" to the claimants, who had waited 17 years for the money seized by the vesting procedure. Concluding that the text of this letter was confusing, insulting and arbitrary, appellants argue that they were not told why their original certificates surrender was being demanded and why only two per cent of their deposits were being refunded, with a resulting inference that a surrender of the original certificate would constitute acquiescence in the two per cent formula and a waiver of further rights of the claimants. Appellants argue that their original certificates constituted their sole tangible remaining evidence of a claim, and because of illiteracy, language difficulties and other similar reasons they were reluctant to take any step which might either result in a loss of their claim or require them to accept a two per cent award. Accordingly, say this group, they awaited the outcome of the *Abe* v. *Kennedy* case "reasonably anticipa[ting] that if the two per cent formula which had long been in administrative litigation in *Abe* were reversed in the court all Yokohama Bank depositors who had filed timely claims under the act which the Government had recognized as valid would be similarly compensated." Appellants conclude that their refusal to file their original deposit certificates and that their failure to sue or join in a suit while *Abe* was in litigation was "excusable delay" in view of their reasonable reliance upon the Government to treat them equally with claimants in the *Abe* case, espe-

cially since no prejudice accrued to the Government between 1961 and 1964 as a result of these appellants' inactivity.

In answer, the appellee points out that these actions arising under the Trading with the Enemy Act are suits against the Government. All conditions of the sovereign's consent to be sued must be complied with, and the failure to satisfy any such condition is fatal to the court's jurisdiction. Since the provision of section 34(f) of the Act creates a 60-day limitation upon the period in which a depositor may establish his status as a claimant or take other action, failure to meet this condition constitutes a fatal failure to meet a prescribed condition precedent to the maintenance of the action.

There is no doubt that this action is a suit against the United States. *Banco Mexicano* v. *Deutsche Bank,* 263 U.S. 591, 602-3 (1924); *Codray* v. *Brownell,* 93 U.S. App. D.C. 112, 207 F.2d 610 (1953), *cert. denied* 347 U.S. 903 (1954). It is equally as well established that failure to satisfy the conditions of the United States' sovereign consent to be sued is fatal to the court's jurisdiction. *Brownell* v. *Nakashima,* 243 F.2d 787 (9th Cir.), *cert. denied* 355 U.S. 872 (1957); *Cisatlantic Corp.* v. *Brownell,* 131 F. Supp. 406 (S.D.N.Y. 1953), *affirmed* 222 F.2d 957 (2d Cir. 1955); *Von Clemm* v. *Smith,* 204 F.Supp. 110 (S.D.N.Y. 1962).

The 1958 letter attacked by appellants is set forth in the appendix of this opinion. (See Appendix B.) The appellee explains the necessity for requiring that the depositors submit their original certificates of deposit by pointing out that the certificates were redeemable to the holder by the banks in Japan, and in numerous cases had been so redeemed, and existence of the original certificates in the claimants' hands was essential to the establishment of an unsatisfied debtor status and in order to avoid double payment. The letter followed in meticulous detail and with painstaking care the requirements of the statute in notifying each of the thousands of depositors, not only of the Custodian's proposal but of the depositors' rights to file objections to the proposal and to initiate court action

if they so desired. As heretofore set forth, the 60-day statutory limitation was set forth specifically and accurately. We question that the Custodian could more completely have outlined the significance of the proposal, creation and status of the forthcoming Final Schedule of Allowed Claims and the rights of the appellants under the statute. To characterize this letter as insulting requires an emotional approach unwarranted by the letter. That it was discouraging to its recipients is obvious. Those recipients were told, however, of the action which they could take if they desired. In some instances, their attorneys were also informed. Their failure to act cannot, we feel, be attributed to any misrepresentation, either affirmatively or negatively, by the appellee. Whatever may have prompted the appellants' action, or lack of action, we conclude it was not any misleading act or inaction on the part of the Government.

IV

These appellants' contention that estoppel is applicable to suits arising under the Trading with the Enemy Act faces immediately our holding that "estoppel cannot be used against the Federal Government" in *Legerlatz* v. *Rogers*, 105 U.S. App. D.C. 256, 266 F.2d 457, 459, n.5 (1959), *cert. dismissed*, 362 U. S. 938 (1960). That case also involved a suit for the return of vested property under the Act involved in the present case. Similar holdings may be found in *Anderegg* v. *United States*, 171 F. 2d 127 (4th Cir. 1948), *cert. denied* 336 U.S. 967 (1949); *Wallace* v. *United States*, 142 F. 2d 240 (2d Cir.), *cert. denied* 323 U.S. 712 (1944).

V

Next, these appellants reason that *Glus* v. *Brooklyn Eastern District Terminal*, *supra*, contains nothing warranting the conclusion that the appellee is excepted from the estoppel principle enunciated therein. We observe, first that the Government was not a party in the *Glus* case. Secondly, the *Glus* opinion is based upon an affirmative claim that the respondent had made a misrepresentation

to the petitioner, thereby misleading him into a course of non-action. Utilizing the basic concept that no man may take advantage of his own wrong, the Supreme Court reversed in order to permit the petitioner to show whether he could, in fact, make out a case calling for the application of the doctrine of estoppel. The *Glus* case, however, does not pretend to announce any new or extended doctrine. Mr. Justice Black quotes in *Glus*, with approval, a statement of basic principle from *Insurance Company* v. *Wilkinson*, 80 U.S. (13 Wall.) 222, 233 (1871) wherein Mr. Justice Miller said:

> "The principle is that where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage. And although the cases to which this principle is to be applied are not as well defined as could be wished, the general doctrine is well understood and is applied by courts of law as well as equity where the technical advantage thus obtained is set up and relied on to defeat the ends of justice or establish a dishonest claim."

We do not believe that the factual record before us permits a conclusion that the appellee "by his representations or his conduct induced" the appellants to give appellee any advantage. This being so, the question of whether the doctrine of estoppel restated in *Glus* is operative against the Government, or more specifically against this appellee, does not enter this case.

Insofar as appellants attempt to relate the estoppel principle of the *Glus* case, we refer back to the discussion of this factor in section II of this opinion and conclude that the record does not support appellants' contention on this point.

VI

Approaching their difficulties from the constitutional viewpoint, these appellants argue that the Fifth Amendment, in providing for due process, precludes the Government from any arbitrary or unreasonable intrusion upon private rights and requires that the Government be held to the highest standards of fairness and reasonableness, and they cite *Communist Party* v. *Subversive Activities Control Board,* 351 U.S. 115 (1956); *Wong Yang Sung* v. *McGrath,* 339 U.S. 33 (1950); *Speiser* v. *Randall,* 357 U.S. 513 (1958), in support of this principle. Continuing, appellants charge that appellee's action with reference to their deposits in the Yokohama Bank constitutes a Government seizure of private property without judicial process. Citing *Central Union Trust Co.* v. *Garvan,* 254 U.S. 554, 566 (1921), the argument continues that the qualification of the alien property seizure therein is valid only "if adequate provision is made for a return in case of mistake" establishes a standard of "adequate provision," which because of the application of the 60-day limitation clause has not been met in this case.

The appellee denies in rather general terms the existence of a constitutional issue in these cases.

The record supports the appellee's argument that the property taken and vested by the Custodian was the property of the Yokohama Specie Bank and not the property of the appellants. That deposits in banks become property of the bank and create a debtor-creditor relationship between bank and depositor is universally recognized. See *e.g., Anderson National Bank* v. *Luckett,* 321 U.S. 233 (1944); *Killoren* v. *First National Bank,* 127 F.2d 537, 541 (C.C.A. 8th Cir. 1942); *Cicero State Bank* v. *Crowley,* 115 F.2d 1022 (C.C.A. 7th Cir. 1940). It follows that the property of the appellants—that is, the debt to them of the Yokohama Specie Bank—still belongs to appellants and has never been seized by the Custodian. The existence of this property in the control and possession of the appellants is further emphasized by the fact, heretofore pointed out, that each appellant may recover

in Japan from the Yokohama Specie Bank on the basis of his original deposit certificate, albeit at a rate of exchange not pleasing or acceptable to him.

The constitutional question may be viewed from another viewpoint. Appellants are creditors of a wartime enemy commercial enterprise. The American-based assets were legally vested by valid Act of Congress. Thereafter, as a matter of grace, Congress, by enacting section 34 of the Act, conferred upon certain creditors of enemy enterprises a means of attempting to recover upon their claims from those assets of the debtor which were held by the Custodian. The action did not, however, create a constitutional right in the creditors to recover. The practical effect of section 34 is to provide a means of pro rata distribution of vested funds among those claimant-creditors who are able under the statute to establish their right to this recovery. Certainly, the creditors have not acquired by section 34 of the Act a property right in vested funds.

We conclude that the appellants have not been deprived of any constitutional right by the appellee in these proceedings.

VII

Turning now to the *Okamoto* case, we recall that this group of appellants are the depositors in the Yokohama Specie Bank whose claims were rejected by the appellee because these people had been interned and paroled and were, consequently, barred by the statute from recovery of their deposits. It is argued on behalf of these appellants that the Government, to their detriment, is taking an inconsistent and consequently illegal position by first claiming the Trading with the Enemy Act created no rights for appellants and "does not apply to them," in permitting the processing of their deposit claims but later claiming that the Act's 60-day limitation clause does apply to appellants when they seek through the courts to press their suit. On this basis, these appellants, relying on *Interstate Commerce Comm'n.* v. *United States ex rel Humboldt Steamship Co.*, 224 U.S. 474 (1912), argue that the courts have authority in this case by mandamus to compel the Custodian to accept the claims of appellants

and to proceed to the merits of their claim. In advancing this argument, the appellants emphasize the distinction between the exercise of an agency's discretionary power and a denial of power from a misunderstanding of the law.

Our review of the *Humboldt Steamship Co.* case establishes a vital distinction from the situation that confronts us here. In *Humboldt,* the Interstate Commerce Commission "refused to proceed at all, though the law required it to do so," 224 U.S. at 485. Here, the Custodian exercised jurisdiction initially over these appellants' claims. The claims were reviewed and dismissed on the ground of ineligibility of the claimants under the provisions of the Act. Jurisdiction was exercised, and it was adverse to appellants. Under these circumstances, proceedings in the nature of mandamus will not lie. But, say these appellants, mandamus will lie where " * * * the erroneous decision cannot be reviewed on appeal of writ of error," citing *Louisville Cement Co.* v. *Interstate Commerce Comm'n.,* 246 U.S. 638, 643 (1918). Unfortunately for this approach, we have in the present case statutory provision for review of the Custodian's action in rejecting the claims of these appellants. Section 34(f) of the Act provides a remedy which is an exclusive one and one which the claimants failed to utilize, although complaint for review was brought by a similarly situated depositor in another vested Japanese bank case. See *Sasaki* v. *Rogers,* 185 F. Supp. 191 (D.D.C. 1960).

A further contention of this group of claimants is that the Fifth Amendment prevents dismissal of their claims. Again, the short—and we think obvious—answer to this argument is that if the appellants desired to contest the constitutionality of the eligibility provisions of section 34(a) of the Act, they could, and should, have filed a timely complaint for judicial review.

VIII

We conclude upon the entire record in all three cases that the District Court acted correctly in dismissing these cases on March 31, 1965.

IX

The unique and unfortunate circumstances which have deprived these appellants of their deposits in the Yokohama Specie Bank command sympathetic consideration of their problem. Arguments made to the court were broadly spiced with a strong emotional appeal. Appellants' sincere counsel valiantly attempted under the label of "equitable considerations" to lead the court to abandon established legal principles and upon purely humane grounds return to the appellants the funds which represented their savings on December 7, 1941. Benevolence is a noble virtue, but it cannot be a foundation for legal opinions, regardless of the need of the litigant or the strictly emotional appeal of his plight. It is not for the courts to turn their backs upon legal principles, precepts and established law in order to accomplish an end which is suggested by a desire to accomplish a humane objective. To do so would immediately constitute the creation of a program of judicial legislation in complete disregard of our constitutional limitations and separation of powers. Obviously, Congress, enacting into law the will of the people, must write our country's laws. The dangers of wartime, the military and economic problems of the early 1940's, are far behind us. Perhaps now the necessities that required the enactment of the Trading with the Enemy Act have so far passed into history that Congress may wish to reconsider the status of these appellans and another disposition of their claims. It is not for the court to suggest to Congress what it should or should not do. We suggest only that the relief sought by these appellants lies solely in legislative hands.

Affirmed.

Appendix A

Section 34 of the Trading with the Enemy Act, 60 Stat. 925 (1946), 50 U.S.C. App. § 34 (1951).

Sec. 34(a). Any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, shall be equitably applied by the Custodian in accordance with the provisions of this section to the payment of debts owed by the person who owned such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian. * * * Debt claims allowable hereunder shall include only those of citizens of the United States or the Philippine Islands; those of corporations organized under the laws of the United States or any State, Territory, or possession thereof, or the District of Columbia or the Philippine Islands; those of other natural persons who are and have been since the beginning of the war residents of the United States and who have not during the war been interned or paroled pursuant to the Alien Enemy Act; * * *

Sec. 34(b). The Custodian shall fix a date or dates after which the filing of debt claims in respect of any or all debtors shall be barred, and may extend the time so fixed, and shall give at least sixty days' notice thereof by publication in the Federal Register. * * *

Section 34(f). If the aggregate of debt claims filed as prescribed exceeds the money from which, in accordance with subsection (d) hereof, payment may be made, the Custodian shall prepare and serve by registered mail on all claimants a schedule of all debt claims allowed and the proposed payment to each claimant. In preparing such schedule, the Custodian shall assign priorities in accordance with the provisions of subsection (g) hereof. Within sixty days after the date of mailing of such schedule, any claimant considering himself aggrieved may file in the District Court of the United States for the District of Columbia a complaint for review of such schedule, naming the Custodian as defendant. A copy of such complaint

shall be served upon the Custodian and on each claimant named in the schedule. The Custodian, within forty-five days after service on him, shall certify and file in said court a transcript of the record of proceedings in the Office of Alien Property Custodian with respect to such schedule. Upon good cause shown such time may be extended by the court. Such record shall include the claims in question as filed, such evidence with respect thereto as may have been presented to the Custodian or introduced into the record by him, any findings or other determinations made by the Custodian with respect thereto, and the schedule prepared by the Custodian. The court may, in its discretion, take additional evidence, upon a showing that such evidence was offered to and excluded by the Custodian or could not reasonably have been adduced before him or was not available to him. Any interested debt claimant who has filed a claim with the Custodian pursuant to this section, upon timely application to the court, shall be permitted to intervene in such review proceedings. The court shall enter judgment affirming or modifying the schedule as prepared by the Custodian and directing payment, if any be found due, pursuant to the schedule as affirmed or modified and to the extent of the money from which, in accordance with subsection (d) hereof, payment may be made. Pending the decision of the court on such complaint for review, and pending final determination of any appeal from such decision, payment may be made only to an extent, if any, consistent with the contentions of all claimants for review.

Appendix B

(J.A. 6)

Exhibit A

Registered Mail
Return Receipt Requested

Ayako Honda
1576 Valota Road
Redwood City, California

Dear Sir:

Reference is made to the above-numbered debt claim which has been filed with this Office with respect to the insolvent account of the Yokohama Specie Bank, Ltd. The claim is based upon yen certificates of deposit.

The Director of this Office decided on November 13, 1957, *In the Matter of Kunio Abe, et. al.*, Claim No. 55507, Docket No. 55 D 72, which decision the Attorney General has declined to review, that yen certificates of deposit issued by the Yokohama Specie Bank Ltd., and the Sumitomo Bank, Ltd. are obligations payable in yen in Japan, and that claims based on such certificates of deposit are to be allowed and paid in United States currency at the post war rate of exchange in accordance with the "Judgment Day" rule set forth in *Deutsche Bank* v. *Humphrey*, 272 U.S. 517 (1926). Thus, the current rate of exchange of 361.55 yen to one dollar must be used in converting the yen into a dollar amount. Interest is allowable from the date of deposit to the date of payment.

Therefore, if you submit your original certificates of deposit to this Office, I can recommend your claim for allowance in the sum of $9.09 plus interest. If you have lost your certificates, you should prepare a statement setting out that the deposits were made as alleged in the Notice of Claim form, giving the numbers of the certificates, the dates of the deposits, and the branch of the Bank at which the certificates were purchased. You should also state that you have not received payment from the

Bank or accepted renewed certificates of deposit. This statement should be signed and sworn to by you before a Notary Public and forwarded to this Office in support of your claim.

(J.A. 7)

Payment of your claim, however, will not be made immediately. Under the procedures set forth in section 34(f) of the Trading with the Enemy Act, as amended (50 U.S.C. App. 34(f); it is necessary that all of the approximately 9000 claims filed against the Yokohama Specie Bank, Ltd. be reviewed and a schedule issued showing the proposed payments before any payments can be made. Within sixty days after the issuance of the schedule, any aggrieved claimant may file in the District Court of the United States for the District of Columbia a complaint for review of such schedule, naming the Attorney General as defendant. If no complaint for review is filed, payments will be made in accordance with the schedule.

Advice received by this Office is to the effect that yen certificate of deposit accounts are carried on the books of the Yokohama Specie Bank, Ltd. in Japan, and the funds may be withdrawn in that country or transferred to the Bank of Toyko, Ltd. Under the circumstances, you may wish to utilize the funds in Japan rather than await settlement by this Office. If this is done, the Notice of Claim filed with this Office should be canceled by signing and mailing the enclosed Notice of Cancellation of Claim card.

If, however, you wish to maintain your claim with this Office you are requested to submit the original certificates of deposit or the notarized statement as to why they cannot be forwarded. In the event you object to the allowance of your claim in the amount stated above, you should submit the certificates to this Office within the next forty-five days and file a statement specifying your objections, together with the reasons in support thereof. Upon receipt of your objections, if I consider them to be without merit, I shall apply to the Director of this Office, pursuant to section 502.25(1) of the Rules of Procedure for Claims, a copy of which is enclosed, for the entry of an Order allowing your

claim in the principal amount stated above, plus interest, and dismissing any portion over and above that amount on the ground that there is no debt due and owing to you by the Yokohama Specie Bank, Ltd. in excess of that amount. In acting upon my application, the Director will consider the statement of objections that you may have submitted.

(J.A. 8)

On the other hand, if within the next forty-five days you do not submit the original certificates of deposit or a statement explaining why they cannot be forwarded, I shall conclude that the claim has been abandoned in its entirety and, without further notice to you, shall apply to the Director for the entry of an Order dismissing the claim on the ground of abandonment, pursuant to section 502.25(g) and (i) of the Rules of Procedure for Claims.

To recapitulate:

1. If you wish to maintain your claim with this Office, you should within forty-five days forward the original certificates of deposit and, if you with to do so, file a statement of your objections to the allowance of the claim in the amount stated above.

2. If you wish to maintain your claim but do not have the original certificates of deposit, you should within forty-five days submit a statement, signed and sworn to before a Notary Public, giving the details of the deposits and stating that you have not received payment or renewed certificates. If you wish to do so, you may also file a statement of your objections to the allowance of the claim in the amount stated.

3. I shall then apply to the Director for an Order allowing your claim in the principal amount stated above, plus interest, and dismissing any portion over and above that amount. Where objections have been filed, they will be submitted to the Director for his consideration in acting upon your claim.

4. If, within forty-five days, you do not submit the original certificates of deposit or an explanation as to why you

cannot forward them, I shall conclude that the claim has been abandoned and shall apply to the Director for an Order dismissing the claim on that ground.

5. If you prefer to utilize the funds in Japan, you should sign and mail the enclosed Notice of Cancellation of Claim card in order to clear the records of this Office.

(J.A. 9)

Please note that the original certificates must be submitted; photostatic copies cannot be substituted.

Sincerely yours,

ARTHUR R. SCHOR,
Chief, Claims Section,
Office of Alien Property.

Enclosures

cc: Wirin, Rissman & Okrand,
257 South Spring Street,
Los Angeles 12, California.

WRIGHT, *Circuit Judge, dissenting:* I agree with the court that these cases command sympathetic consideration for these many thousands of Japanese-American appellants. Respectfully, I dissent from the court's conclusion that we are powerless to provide relief.

Appellants were depositors of the Yokohama Specie Bank, Ltd. when the bank's property in the United States was seized on Pearl Harbor Day and vested as enemy property under the Trading with the Enemy Act, 50 U.S.C.App. §§ 1 *et seq.*, 40 STAT. 411. On August 8, 1946, Congress enacted § 34 of the Trading with the Enemy Act, 60 STAT. 925, which authorized the Alien Property Custodian to pay from the vested proceeds the claims of former owners who were citizens or residents of the United States during World War II and who had not been interned or paroled as potentially dangerous alien enemies. Pursuant to § 34(b) of the Act, the Custodian fixed November 18, 1949, as the final date for filing claims against the Yokohama Bank. Appellants in *Honda,* No. 19,284, *Kondo,* No. 19,282, and *Okamoto,* No. 19,283, all filed timely claims. The Govern-

ment refused to recognize the claims of appellants in *Okamoto* on the ground they were ineligible under the statute because they had been interned and paroled. This ruling was correct and disposes of that case.[1]

The claims of appellants in *Honda* and *Kondo* were recognized by the Custodian, however, to the extent that toward the end of 1958 they were sent letters as eligible claimants, instructing them to send in their original certificates of deposit or equivalent proof and informing them that if proper proof were submitted a recommendation would be made that their claims be allowed at the post-war rate of exchange, which amounted to approximately 2% of the pre-war rate. Appellants were further advised that any claim not timely submitted would be dismissed as abandoned. Appellants failed to comply with the requirements of the 1958 letter.

Around September 1961 the Custodian prepared and sent by registered mail to all claimants a Final Schedule of all Yokohama Bank depositor claims allowed and the proposed payment in each case. A Notice was included advising that "[i]f your claim is not shown on the Schedule, it is for the reason that the claim has been dismissed and disallowed by this Office"; that any claimant considering himself aggrieved "may, within sixty (60) days" file for judicial review; and that "[i]f no such complaint for review is filed within the sixty-day period, payments to claimants will be made" in accordance with the Schedule. Appellants did not file for judicial review within 60 days of the letter, as required by § 34(f) of the Act.

In *Abe* (pronounced "Ah-bey") v. *Kennedy*, a timely complaint, demanding payment at the pre-war rate, was filed in the District Court on behalf of all Yokohama Bank claimants who had complied with the Custodian's 1958

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[1] *Interstate Commerce Com'n* v. *Humboldt Steamship Co.*, 224 U.S. 474 (1912), is inapposite. In *Humboldt*, the I.C.C. "refused to proceed at all, though the law required it to do so." *Id.* at 485. Here, the Custodian exercised jurisdiction over these claims and denied them on the merits. Congress acted within its power when it excluded these appellants, noncitizens at the time of seizure, from the relief the statute affords. *Masami Sasaki* v. *Rogers*, D.D.C., 185 F.Supp. 191 (1960).

letter. Proceedings in *Abe* were stayed pending the outcome of *Aratani* v. *Kennedy*, which involved the same issue with depositors of a different Japanese bank.

The District Court granted the Government's motion to dismiss in Aratani, this court affirmed, 115 U.S.App. D.C. 97, 317 F.2d 161, 323 F.2d 427, and the Supreme Court granted *certiorari*, 375 U.S. 877 (1963). The Government then entered into a settlement with complainants in *Aratani* and *Abe*, which was referred to the District Court by the Supreme Court, 376 U.S. 936 (1964), and approved in 1964, D.D.C., 228 F.Supp. 706. The *Abe* settlement was for well over 60% of the amount claimed, and in fact came to approximately 100% of the original deposits without interest.[2] Appellants' petition to be included in the settlement was denied by the Government on the ground that they were not parties to the litigation being compromised. They then brought these actions. The District Court granted a Government motion to dismiss for lack of jurisdiction because the complaints were filed long after the 60-day limitation period prescribed by the Act. This appeal challenges the dismissal.

I

Appellants urge us, under the circumstances of this case, to estop the Government from asserting the 60-day statute of limitations. In addition to denying that any basis for estoppel is shown, the Government advances two arguments which would bar consideration of the plea.

The Government argues first that estoppel cannot be applied against it. It may be true that estoppel does not lie against the United States where its officers or agents, without authority, enter into agreements to do what the law does not sanction or permit. *E.g.*, *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380 (1947); *United States* v. *Stewart*, 311 U.S. 60, 70 (1940). Compare Maguire & Zimet, *Hobson's Choice and Similar Practices in Federal*

[2] The Government's statement implies that the settlement was for 49% of the amount claimed. Actually, 49% is the amount paid over to the claimants—*i.e.*, the total award less 20% for attorneys' fees. Brief for Respondent, p. 7.

Taxation, 48 HARV. L. REV. 1281, 1299 (1935). But when the conduct relied upon as the basis for estoppel is authorized, estoppel has often been applied against the Government by a number of courts, including this one.[3] Here, admittedly, the officers who communicated with appellants and who formulated the policy which resulted in the 1958 offer and the 1963 settlement all acted within their authority.

The Government's second argument, that the 60-day limitation period for judicial review provided in the Act is "substantive" rather than "procedural" and therefore cannot be extended, is likewise unfounded. The suggestion seems to be that, since the limitation provision is included in the same Act which creates the right, the passage of time itself extinguishes the right. The Supreme Court rejected

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[3] *Stockstrom* v. *Commissioner of Internal Revenue*, 88 U.S. App. D.C. 286, 190 F. 2d 283 (1951); *Vestal* v. *Commissioner of Internal Revenue*, 80 U.S.App.D.C. 264, 152 F. 2d 132 (1945). Berger, *Estoppel Against the Government*, 21 U. CHI. L. REV. 680, 687-688 (1954):

> "However the case may be with respect to 'unauthorized' conduct, estoppel clearly may be based upon 'authorized' conduct. From the Supreme Court's oft-repeated formulation of the immunity from estoppel in terms of administrative action that 'the law does not sanction or permit,' it may be inferred that government is bound by actions within the scope of the agent's authority. A steadily growing number of federal courts have properly so held, for the sole tenable argument for the immunity derives from separation of powers considerations which have no play where administrative action is *authorized* by Congress. In such case the government should be and is estopped." (Emphasis in original.)

In holding that estoppel cannot be applied against the Government, the majority ignores these authorities. The statement in *Legerlotz* v. *Rogers*, 105 U.S.App.D.C. 256, 258 n.5, 266 F. 2d 457, 459 n.5 (1959), relied on by the majority that estoppel does not lie against the Government, is dictum and arose in a context which clearly precluded application of the doctrine. The Attorney General had sent plaintiff a Notice of Intention to return a certain sum seized during the war, but later decided to retain a part of the sum involved. Plaintiff, allegedly in reliance upon the Notice, failed to bring suit within the two years prescribed by statute. But the court pointed out that the statute specifically provided that a Notice of Intention conferred no right of action to compel the return of property; the provision's purpose was to leave the Attorney General with the power freely to change his mind.

this argument in ruling that estoppel may prevent a private party from pleading the "substantive" limitation period of the Federal Employers' Liability Act. *Glus* v. *Brooklyn Eastern Terminal*, 359 U.S. 231 (1959). See also *United States* v. *Price-McNemar Construction Co.*, 9 Cir., 320 F. 2d 663 (1963) (estoppel applied in favor of the Government in Miller Act case despite "substantive" statute of limitations). More recently, also in tolling the FELA limitation period, the Supreme Court said: "[T]he 'substantive'-'procedural' distinction would seem to be of little help in deciding questions of extending the limitation period." *Burnett* v. *New York Central R. Co.*, 380 U.S. 424, 427 n.2 (1965). "[T]he basic inquiry is whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances." *Id.* at 427. Of course, Congress can make a limitation period inflexible, but in order to do so it must do more than merely place the limitation and the right in the same statute.

In deciding that the limitation period in FELA was not inflexible the Supreme Court, in *Burnett*, examined "the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the rights given by the Act." 380 U.S. at 427. These cases meet the test of *Burnett*. There are no problems of notice or proof. Appellants' claims, which the Government concedes are valid, were timely filed with the Custodian before 1949. The "'Act itself" is remedial and humane. It was passed at the Custodian's urgent request, in part for the benefit of the Government, and was designed to return to rightful creditors on an equitable basis, rather than according to a "first come, first served" rule, assets kept out of enemy hands.[4] Both Congress and the Cus-

[4] The Supreme Court held, in *Markham* v. *Cabell*, 326 U.S. 404 (1945), that creditors or allies of enemies whose property had been seized by the Custodian during World War II may maintain suits against the Custodian on their debt claims under the Trading with the Enemy Act § 9(a), although that section appeared to apply only to World War I seizures. This resulted in a "first come, first served" rule—a race of creditors which exhausted properties without equitable distribution—and in serious interference with the use of the property to the best interests of the United States. Congress acted promptly. Within one year, § 34 was passed at

todian recognized the strong moral obligation owed to rightful creditors.[5] Certainly any application of equitable principle permissible under FELA, which is designed purely to benefit employees, is permissible here, where the Government also benefited, and where a strong moral obligation was recognized.

Moreover, there is nothing in the Act's "remedial scheme" which indicates congressional intent to limit or preclude equitable extension of the limitation period. Section 34(f) does set out the 60-day requirement, but this only poses the issue rather than answers it.[6] Neither does § 34(i), which provides that the sole relief for vested property claimants shall be that provided in the Act, indicate congressional intention to make the limitation period inflexible. This provision was designed only to prevent independent suits for recovery of property.[7] Speed in resolving all claims was a matter of importance to Congress, but only

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the Custodian's urgent recommendation, providing for the equitable distribution of vested property by disallowing independent suits and by setting up a procedure whereby all claims could be considered and disposed of together. H.R.Rep. No. 2398, 79th Cong., 2d Sess. (1946).

[5] "The Custodian has emphasized to the committee that he is anxious to satisfy the proper claims of creditors and the committee concur in the view that there exists a strong moral obligation to satisfy them inasmuch as, but for the vesting of their debtors' property, they would presumably have been able to pursue ordinary remedies against the debtors." H.R. Rep. No. 2398, *supra* Note 4, at p. 10.

[6] The FELA provision, 45 U.S.C. § 56, if anything, is more absolute: "No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued."

[7] As pointed out *supra*, Note 4, passage of the present § 34 of the Act was generated by the Supreme Court ruling that creditors could sue, necessarily on a "first come, first served" basis, under § 9(a). The committee report makes clear that § 34(i) was passed to preclude § 9(a) suits:

> "Section 35(i) [now 34(i)] is generally procedural in nature. It provides that the debt claim provisions of the bill shall constitute the sole relief of creditors, except for their right to sue the original debtor or any other person liable. It is expressly provided that debt claim suits heretofore filed under section 9(a) shall not be continued and only suits to review the Custodian's determination under the bill are maintainable with respect to debt claims. This is believed necessary to the effective operation of the debt claim provisions of the bill. * * *" H.R.Rep. No. 2398, *supra* Note 4, at p. 15.

as it related to the general purpose of effectuating an equitable distribution. Thus § 34(b) ordered the Custodian to fix "bar dates" within which debt claims could be filed, no later than two years from the date of vesting or of enactment. This enabled the Custodian to determine at one time which claimants were eligible, and to distribute each account equitably. Appellants complied with this fundamental requirement.[8] The 60-day limitation with which they failed to comply can hardly be said to constitute a fundamental and inflexible part of the Act's remedial scheme.[9]

Reiterating the old aphorism—"The failure to satisfy the conditions of the sovereign's consent to be sued is fatal to the court's jurisdiction"—the Government argues, however, that equitable principles may not be used to vary the literal terms of the sovereign's consent. But neither reason nor authority is advanced to show why the approach taken in *Glus* and *Burnett* in determining whether a "substantive" limitation period is inflexible should not apply in suits against the Government. In fact, *Burnett* cited with

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[8] It is upon non-compliance with the similarly fundamental requirement of § 33 of the Act that the cases cited by the Government are based. See, *e.g.*, *Brownell* v. *Morizo Nakashima*, 9 Cir., 243 F. 2d 787, *cert. denied*, 355 U.S. 872 (1947).

[9] The suppletive nature of the requirement makes it analogous to the 60-day reporting requirement in *N. V. Philips' Gloeilampenfabrieken* v. *Atomic Energy Com'n*, 114 U.S.App.D.C. 400, 316 F. 2d 401 (1963). There, petitioners owned certain foreign patents which were divulged to the United States Government in connection with Project Manhattan and were widely used. The Patent Compensation Board rejected petitioners' claim for "just compensation" on the ground that petitioners had failed to file a report describing the processes of their inventions within 60 days of the passage of the statute conferring a right to compensation. We looked to the purpose of the requirement and found, not a mechanical reporting process, but a means for assuring disclosure. It was conceded that the A.E.C. had the relevant information. We concluded: "Under the circumstances of this case, the Commission should not be allowed to seize upon this technicality to avoid a responsibility which the Congress recognized." 114 U.S.App.D.C. at 408, 316 F. 2d at 409. Since in these cases the Custodian knew of appellants' claims and could include them in his computations in equitably distributing the Yokohama property, the failure to file for review in time did not interfere with the basic purpose of the Act.

approval [10] *Osbourne v. United States*, 2 Cir., 164 F.2d 767 (1947), which involved claims against the Government under the Suits in Admiralty Act and against a private employer under the Jones Act. The court in *Osbourne* tolled the "substantive" limitation periods of both statutes without discussing any possible difference between them. If equitable principles may be applied to extend the limitation period for a claim against the Government which would have to be satisfied from the federal treasury, as in *Osbourne*, no reason appears why such principles should not be applicable in suits against the United States where the claims are to be satisfied only from vested funds of the Yokohama Bank.

II

The Government's opposition on the merits to the plea of estoppel is predicated on a rigid and mechanical approach to that doctrine. Estoppel is a "simple and wholly untechnical conception, perhaps the most powerful and flexible instrument to be found in any system of court jurisprudence." Statement of Sir Frederick Pollock, quoted in *Canada and Dominion Sugar Co. Ltd.* v. *Canadian National Steamships, Ltd.*, [1947] A.C. 46, 55. It should be neither rigidly circumscribed nor mechanically applied.[11] This does not mean courts are free to apply estoppel indiscriminately. The fundamental requirements—a representation, reliance, change of position, detriment—must be met.[12] But once these elements are present, the novelty of a particular case should not deter courts from using the device to do justice.

The facts of this case reveal a combination of circumstances and procedures which have operated to bring about a potential injustice of substantial proportion. Appellants all filed timely claims. They could have obtained the post-war ratio for their deposits at any time at the Yokohama Bank in Japan. They did not. Rather, they

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[10] 380 U.S. at 427.

[11] Courts have refused to follow rigid definitions of the doctrine. See generally Berger, *op.cit.supra* Note 3; Dawson, *Estoppel and Statutes of Limitation*, 34 MICH. L. REV. 1 (1935); Lynn & Gerson, *Quasi-Estoppel Applied Against the United States in Federal Tax Controversies*, 19 TAX L. REV. 487 (1964).

[12] See 3 POMEROY, EQUITY JURISPRUDENCE § 805 (5th ed. 1941).

held on to their certificates of deposit, hoping their own government, applying the beneficent provision of the Act, would treat them more fairly. But in 1958, after waiting 12 years to cash their deposit certificates, the Custodian informed them their recovery would be limited to the post-war ratio.

Many of the appellants undoubtedly could not understand the Custodian's technical letter. But even if we assume they could, it seems certain the letter discouraged them from filing their certificates. The ratio offered rendered their small deposits almost completely worthless. A $500 creditor suddenly found he might be entitled to $10. Moreover, the letter pointed out that "[p]ayment of your claim, however, will not be made immediately," because it remained necessary to compile a Final Schedule (which took approximately three years). The letter then advised, however, that claimants could receive the same rate in Japan without going through as much trouble: "Under the circumstansces, you may wish to utilize the funds in Japan rather than await settlement by this Office."

The 1958 letter unquestionably contained an authorized representation of fact—that it was the Government's position that payment should be made at the post-war rate. This representation was relied upon by appellants when they failed to file their certificates, knowing full well they could get the same rate at any time in Japan. The Government knew reliance might follow, and encouraged such reliance by suggesting Japan as an alternate, speedier source of funds. That only 1,817 of about 7,500 eligible claimants complied with the letter is strong evidence of its effect.

It turns out, however, that the Government's position changed. When the Supreme Court granted *certiorari* in *Aratani*, the Government settled the cases on a basis completely at variance with its original position. The power of the Government to take its 1958 position, and to change its position in 1963, is incontestible. But the exercise of this power cannot become a means, whether intentional or

inadvertent,[13] whereby innocent persons who acted in reliance upon the Government's first representation should be denied the opportunity to recoup moneys which Congress wanted returned. The pattern of events—the letter which discouraged filing of certificates because of the position taken therein, the failure of the vast majority of claimants to file certificates, the subsequent change of position and settlement, the exclusion of appellants from the benefits of the change of position—could hardly have been better designed to secure exclusion of most claimants from the relief Congress afforded them, and from the relief to which the Office of Alien Property now apparently agrees they were always entitled.

We have here a remedial and humane piece of legislation designed to secure the equitable return of property to American citizens. The purposes of the limitation period have been satisfied, and nothing in the Act's remedial scheme limits or precludes equitable extension of the limitation period. The Yokohama Bank account, with over $10,000,000 in cash, has more than enough to pay appellants the same rate paid the claimants in *Abe*. Under these circumstances, the Government should not be permitted to assert the statute of limitations as a bar to the suit. Appellants should be allowed to take advantage of the Government's new position.

I respectfully dissent.

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[13] See *Peters v. St. Paul Fire & Marine Insurance Company*, S.D.N.Y., 213 F.Supp. 441, 442 (1963):

> "Where one party induces another to delay in bringing suit so that an applicable period of limitation expires, he may be estopped from asserting such expiration in defense even though the inducement to delay was done innocently or unintentionally. • • •"

See also *Romano* v. *Metropolitan Life Ins. Co.*, 271 N.Y. 288, 2 N.E.2d 661 (1936).

Filed January 13, 1966—Nathan J. Paulson, Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1965

Civil 1630-64
Civil 1591-64

No. 19,282

MASAE KONDO, et al., *Appellants,*

v.

NICHOLAS deB. KATZENBACH,
Attorney General of the United States, *Appellee.*

No. 19,283

MASARU OKAMOTO, et al., *Appellants,*

v.

NICHOLAS deB. KATZENBACH,
Attorney General of the United States, *Appellee.*

No. 19,284

AYAKO HONDA, et al., *Appellants,*

v.

NICHOLAS deB. KATZENBACH,
Attorney General of the United States, *Appellee.*

Appeals from the United States District Court for the District of Columbia.

Before: Danaher, Wright and Tamm, Circuit Judges.

JUDGMENT

These cases came on to be heard on the records on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

On Consideration Whereof, it is ordered and adjudged by this court that the orders of the District Court on appeal in these cases are affirmed.

Per Circuit Judge Tamm.

Dated: January 13. 1966.

Separate dissenting opinion by Circuit Judge Wright.

Filed February 24, 1966—Nathan J. Paulson, Clerk

United States Court of Appeals for the District of Columbia Circuit

September Term, 1965

Civil Action 1630-64
Civil Action 1591-64
Civil Action 1179-64

No. 19,282
No. 19,283
No. 19,284

Order

On consideration of appellants' petition for rehearing *en banc*, it is

Ordered by the court *en banc* that appellants' aforesaid petition is denied.

Per Curiam.

Circuit Judge Wright would grant appellants' aforesaid petition.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~[illegible]~~ 164

AYAKO HONDA, et al.,
Petitioners,

vs.

NICHOLAS DEB. KATZENBACH,
Attorney General of the United States.

MASAE KONDO, et al.,
Petitioners,

NICHOLAS DEB. KATZENBACH,
Attorney General of the United States.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Memorandum of the State of California as Amicus Curiae

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. .....

AYAKO HONDA, et al.,
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Attorney General of the United States.

MASAE KONDO, et al.,
Petitioners,

NICHOLAS deB. KATZENBACH,
Attorney General of the United States.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Memorandum of the State of California as Amicus Curiae

Because it has been the policy of the State of California to redress as far as possible the unfortunate injuries suffered by Japanese-American citizens during World War II, and because we are convinced that a sound legal and equitable basis lies within the power of this Court to continue that policy in the case at bar, the Attorney General

of the State of California deems it appropriate to present this memorandum *amicus curiae* in support of the position of the petitioners.

We understand that the persons represented by these petitioners are of Japanese ancestry, and that most, if not all, are citizens of the United States by birth or naturalization. Moreover, a majority of them are residents of California.

During the years 1946 to the present, the California Legislature and Supreme Court have taken steps to ameliorate grievances suffered during the war years by Japanese-American citizens of California. While this Court's decision in *Oyama v. California*, 332 U.S. 633 (1948), did not declare completely unconstitutional California's Alien Land Law, the California Supreme Court thereafter held the law invalid as violating the Fourteenth Amendment to the United States Constitution. *Sei Fujii v. California*, 38 Cal.2d 718, 242 P.2d 617 (1952).

Prior to that decision, a predecessor California Attorney General had compromised, settled or dismissed escheat cases which had been filed under the Alien Land Law. Pursuant to the decision in *Sei Fujii*, the California Legislature made provision for the return with interest of all monies which had been paid to the State by reason of such settlements, as well as those which had been realized by the State from property escheated under the Alien Land Act. Cal. Stat. ch. 1816, p. 3600 (1953).

The Congress of the United States has expressed the same basic policy. See, e.g., amendment to the Immigration and Naturalization Act, 66 Stat. 239, 8 U.S.C.A. § 1422 (1952) (removed racial barrier to citizenship); American-Japanese Evacuation Claims Act, 62 Stat. 1231, 50 U.S.C.A. App. §§ 1981-87 (1948) (authorized compensation for losses incurred because of evacuation).

California's concern, however, does not end with these petitioners. They represent subsequent generations of Japanese-Americans as well. The injustice inherent in the decision of the lower court will leave its bitter imprint on these new generations unless this Court acts.

We are concerned as well with the petitioners who are not California citizens. California, though a sovereign state, is proclaimed by its Constitution an inseparable part of the American union.[1] Over one hundred years of history reinforce that proclamation. California's people are firmly welded into the single economic and social unit which constitutes our great nation. An injustice to any American citizen is of great concern to the people of California.

We are convinced that the ruling of the lower court is erroneous and represents a regression to an unfortunate era, an era we hoped had ended several years ago.

The State of California respectfully urges this Court to grant the petition for writ of certiorari.

Dated:

Respectfully submitted,

THOMAS C. LYNCH
Attorney General of California

CHARLES A. O'BRIEN
Chief Deputy Attorney General

CHARLES W. RUMPH
Deputy Attorney General

Attorneys for
Amicus Curiae

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1. Cal. Const. Art. I, § 3.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 164

AYAKO HONDA, ET AL., PETITIONERS

v.

NICHOLAS DEB. KATZENBACH,
ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 17) is reported *sub nom. Kondo* v. *Katzenbach* at 356 F. 2d 351. The district court did not render an opinion.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1966 (Pet. 46). Petitioners' timely

motion for rehearing *en banc* was denied on February 24, 1966 (Pet. 47). The petition for a writ of certiorari was filed on May 23, 1966. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Petitioners failed to seek judicial review of respondent's denial of their debt claims "within sixty days," as prescribed by section 34 of the Trading With the Enemy Act. The question presented is whether the court of appeals erred in ruling that the Attorney General was not barred by reason of equitable estoppel from pleading the statute of limitations.

STATUTE INVOLVED

Section 34 of the Trading With the Enemy Act, 50 U.S.C. App. 34, provides in pertinent part:

Section 34(a):

> Any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, shall be equitably applied by the Custodian in accordance with the provisions of this section to the payment of debts owed by the person who owned such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian. No debt claim shall be allowed under this section if it was not due and owing at the time of such vesting or transfer * * *.
>
> * * * *

Section 34(d):

Payment of debt claims shall be made only out of such money included in, or received as net proceeds from the sale, use, or other disposition of, any property or interest owned by the debtor immediately prior to its vesting in or transfer to the Alien Property Custodian, as shall remain after deduction of (1) the amount of the expenses of the Office of Alien Property Custodian (including both expenses in connection with such property or interest or proceeds thereof, and such portion as the Custodian shall fix of the other expenses of the Office of Alien Property Custodian), and of taxes, as defined in section 36 hereof [section 36 of this Appendix], paid by the Custodian in respect of such property or interest or proceeds, and (2) such amount, if any, as the Custodian may establish as a cash reserve for the future payment of such expenses and taxes. If the money available hereunder for the payment of debt claims against the debtor is insufficient for the satisfaction of all claims allowed by the Custodian, ratable payments shall be made in accordance with subsection (g) hereof to the extent permitted by the money available and additional payments shall be made whenever the Custodian shall determine that substantial further money has become available, through liquidation of any such property or interest or otherwise. * * *.

* * * *

Section 34(f):

If the aggregate of debt claims filed as prescribed exceeds the money from which, in accordance with subsection (d) hereof, payment may

be made, the Custodian shall prepare and serve by registered mail on all claimants a schedule of all debt claims allowed and the proposed payment to each claimant. In preparing such schedule, the Custodian shall assign priorities in accordance with the provisions of subsection (g) hereof. Within sixty days after the date of mailing of such schedule, any claimant considering himself aggrieved may file in the United States District Court for the District of Columbia a complaint for review of such schedule, naming the Custodian as defendant. A copy of such complaint shall be served upon the Custodian and on each claimant named in the schedule. * * * The court shall enter judgment affirming or modifying the schedule as prepared by the Custodian and directing payment, if any be found due, pursuant to the schedule as affirmed or modified and to the extent of the money from which, in accordance with subsection (d) hereof, payment may be made. Pending the decision of the court on such complaint for review, and pending final determination of any appeal from such decision, payment may be made only to an extent, if any, consistent with the contentions of all claimants for review.

* * * *

Section 34(i):

The sole relief and remedy available to any person seeking satisfaction of a debt claim out of any property or interest which shall have been vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the proceeds thereof, shall be the relief and remedy provided in this

section, and suits for the satisfaction of debt claims shall not be instituted, prosecuted, or further maintained except in conformity with this section: * * *.

STATEMENT

Section 34 of the Trading with the Enemy Act, 50 U.S.C. App. 34, authorizes the Alien Property Custodian [1] to satisfy, out of the proceeds of property vested under the Act, the claims of certain creditors against the former owners of such property. Where, as in the instant situation, the aggregate of debt claims exceeds the money available to pay them, the Act requires the Custodian to prepare and mail to each claimant a final "schedule" of claims allowed and his proposed payments. 50 U.S.C. App. 34(f). Claimants dissatisfied with the Custodian's proposal may then "file * * * a complaint for review of such schedule" in the United States District Court for the District of Columbia "[w]ithin sixty days after the date of mailing of such schedule * * *," *Ibid.* Section 34 expressly provides that this is the "sole relief and remedy available" to any person seeking satisfaction of a debt claim out of property vested by the Custodian and that "suits for the satisfaction of debt claims shall not be instituted, prosecuted or further maintained except in conformity with this section." 50 U.S.C. App. 34(i).

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[1] By Executive Order No. 9788 of October 14, 1946, 11 F.R. 11981, the respondent Attorney General succeeded to the powers and duties of the Alien Property Custodian.

Petitioners are five individuals whose debt claims were finally disallowed by the Custodian in October of 1961 (J.A. 34).[2] (As to the sixth petitioner, Mrs. Masae Kondo, see note 5, *infra*.) They did not institute the present suits for judicial review of the Custodian's decision until May and July of 1964, more than two and one-half years later (J.A. 1). The district court dismissed petitioners' suit as untimely, rejecting their contention that any action taken by government officials estopped respondent from defending on the ground of untimeliness. The court of appeals affirmed, one judge dissenting. The only issue presented here is whether the court of appeals erred in affirming the district court's ruling that petitioners' action was barred as untimely.

This litigation stems from the action of the Alien Property Custodian in vesting the American assets of the Japanese-owned Yokohama Specie Bank, Ltd., as enemy property. At the time of the vesting, petitioners were depositors, and therefore creditors, of that bank. After the Second World War, the Japanese liquidator of the Yokohama Specie Bank and the bank's successor, the Bank of Tokyo, Ltd., continued to honor, and pay with interest, the face amounts of certificates of deposit such as those held by petitioner. Such payments were made in *yen*, however, the value of which had declined from $.234 before the Second World War to a post-war exchange rate of 361.55 to the dollar.

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[2] "J.A." refers to the printed Joint Appendix filed in the court of appeals, copies of which petitioners have filed with the clerk under Rules of this Court.

Petitioners filed debt claims with the Alien Property Custodian under Section 34 of the Trading with the Enemy Act, seeking to recover the pre-war value of their *yen* deposits. More than ten thousand claims were filed against the vested assets of the Yokohama Specie Bank, Ltd., seventy-five hundred by holders of *yen* deposit certificates similar to petitioners'. Because the aggregate value of these claims exceeded the value of the seized assets of the Bank from which payment could be made, the Alien Property Office proceeded in accordance with section 34(f) of the Act. After extensive hearings (which also concerned similar debt claims against the vested assets of the Sumitomo Bank), respondent took the position, adopted by the banks in Japan, that the certificates of deposit underlying the debt claims in question represented obligations payable in *yen* in Japan. Therefore, following the "Judgment Day" rule laid down by the Court in *Deutsche Bank* v. *Humphrey*, 272 U.S. 517, respondent ruled that all allowable claims would be paid at the post-war exchange rate of 361.55 *yen* to the dollar.

Notice of that ruling, together with the amount of each claim allowed, was then sent by registered mail to the claimants in 1958 and 1959 (Pet. 33, J.A. 6, 29). In order to prepare the final "schedule" required by Section 34(f), those letters also requested that claimants submit to the Custodian their original certificates of deposit or a notarized statement explaining why the certificates could not be submitted and that payment had not previously been received

from the Japanese sources mentioned above. If the certificates or statements were not submitted within a period prescribed in the letter, the claimants were advised that their claims would be treated as abandoned and dismissed. In addition, those letters specifically informed each claimant of his right not only to file with the Custodian "your objections to the allowance of the claim in the amount stated", but also of his right to appeal to the courts under Section 34 of the Trading With the Enemy Act from the Custodian's final ruling on the amount of his claim (Pet. 34):

> Within sixty days after the issuance of the schedule, any aggrieved claimant may file in the District Court of the United States for the District of Columbia a complaint for review of such schedule, naming the Attorney General as defendant. If no complaint for review is filed, payments will be made in accordance with the schedule.

Copies of these letters were sent not only to the named petitioners but to their counsel as well (Pet. 36; J.A. 2, 9 and 32).

Petitioners admittedly received the letters described (J.A. 2). However, they did not submit certificates or notarized statements; nor did they file any objection to the Custodian's ruling with the Office of Alien Property. Their claims were therefore dismissed as abandoned. In October of 1961, the "Final Schedule" with respect to claims against the Yokohama Specie Bank, was issued under Section 34(f) of the Act; copies were correctly sent to these five petitioners by

registered mail as Section 34(f) required (J.A. 34). A letter from the Deputy Director of the Office of Alien Property, which accompanied the final schedule, advised each recipient that (J.A. 34): "If your claim is not shown on the Schedule, it is for the reason that the claim has been dismissed and disallowed by this Office." Petitioners' names were not on the schedule. Each was expressly advised by that letter once again of his right to have the Custodian's decision reviewed in court (J.A. 34, emphasis added):

> This Schedule is being served by registered mail on all claimants listed therein, as well as on claimants whose claims have been dismissed and disallowed. *Pursuant to Section 34(f) of the Trading with the Enemy Act, as amended, any claimant considering himself aggrieved by this Final Schedule may, within sixty (60) days from the date of the mailing of this Schedule, file in the United States District Court for the District of Columbia a complaint for review of this Schedule, naming the Attorney General as defendant.* * * *

None of the five petitioners filed suit within the sixty-day time limit fixed by the Act and described in the letters.

Although none of the petitioners timely sought judicial review of the Final Schedule of payments, other claimants did challenge the Custodian's decision in the district court. A complaint for such review was timely filed under Section 34(f) on behalf of the more than eighteen hundred Yokohama Specie Bank claimants who did submit their certificates to the

Custodian and whose claims were allowed on the final schedule at the post-war *yen* rate of exchange. *Abe* v. *Kennedy*, (C.A. No. 2529-61, D. D.C.). That Complaint asserted that the claims should have been allowed by the Custodian at the pre-war *yen* exchange rate. Proceedings in *Abe* were postponed, however, pending the outcome of *Aratani* v. *Kennedy* (C.A. No. 3164-58, D. D.C.) which raised the identical issue. That case had been previously instituted by persons whose debt claims under Section 34 against the vested funds of the Sumitomo Bank, Ltd., had also been allowed by the Custodian only at the post-war *yen* exchange rate.

On July 7, 1961, the district court rendered judgment in favor of the government in *Aratani;* on March 28, 1963, the court of appeals affirmed, 317 F. 2d 161 (C.A. D.C.); and, on October 21, 1963, this Court granted certiorari, 375 U.S. 877. Thereafter, the claimants and the Attorney General entered into a compromise settlement of both the *Abe* and the *Aratani* cases, which settlement was approved by the district court on March 18, 1964, 228 F. Supp. 706.[3] Under that compromise, the Yokohama Specie Bank claimants received approximately half of the amounts they claimed, together with an award for attorney's fees.[4] Not being parties to the *Abe* litigation, petitioners were not included in the settlement.

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[3] Following that approval, this Court dismissed the writ of certiorari previously granted in *Aratani*. 380 U.S. 938.

[4] Because their claims exceeded the funds available to pay them under the compromise, the Sumitomo claimants re-

After this compromise settlement, petitioners demanded similar treatment of their own claims, notwithstanding their failure either to pursue those claims before the Custodian or to institute timely suit in the courts under Section 34. Respondent denied petitioner's request, taking the position that under Section 39 of the Act, 50 U.S.C. App. 39, the moneys remaining in the Yokohama Specie Bank, Ltd., account in the Alien Property office should be transferred to the War Claims Fund in the Treasury. Moneys in that Fund are used by the Foreign Claims Settlement Commission to pay the war claims of United States citizens who suffered damage as a result of German and Japanese military operations in World War II.

Petitioners then commenced the instant suits in May and July of 1964, in their own behalf "and on behalf of all others similarly situated." This took place over two and one half years after the prescribed sixty-day period had expired. On March 31, 1965, the district court granted respondents' motion to dismiss the actions "because * * * not commenced within the time set forth in Section 34(f) of the Trading With the Enemy Act" (J.A. 36).

On appeal from that dismissal, petitioners' principal contention was that the government's conduct estopped it from raising the statute of limitation defense (Pet. 10-11). The court of appeals (one judge dissenting) held that the doctrine of equitable estoppel does not run against the United States to toll the

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ceived only 25% of their claims. See 228 F. Supp. at 708 and 50 U.S.C. App. 34(d).

period of limitations specified by the Trading With the Enemy Act (Pet. 25); and that, in any event, the court did "not believe * * * that the appellee 'by his representations or his conduct induced' the appellants to give appellee any advantage" (Pet. 26). Rejecting petitioners' contentions, the court below noted that respondent had in fact taken "meticulous" and "painstaking" care to inform petitioners of his adverse decision on their claims and of the judicial avenue for relief open to them if dissatisfied with his rulings (Pet. 24-25). It concluded (J.A. 25):

> failure to act cannot, we feel, be attributed to any misrepresentation, either affirmatively or negatively, by the appellee. Whatever may have prompted the appellants' action, or lack of action, we conclude it was not any misleading act or inaction on the part of the Government.

An application for rehearing *en banc* was denied (one judge dissenting, Pet. 47).[5]

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[5] In the same opinion, the court of appeals also affirmed the district court's dismissal of an action brought by Masaru Okamoto and others whose claims had been disallowed by the Custodian on the ground that they were ineligible for the return of their money under Section 34(a) of the Trading with the Enemy Act because they had been interned as enemy aliens, 50 U.S.C. App. 34(a) (No. 19,283, C.A.D.C., Pet. 28). Appellants in that case have not joined in this petition for certiorari.

The instant petition for certiorari was also filed on behalf of a sixth petitioner, Mrs. Masae Kondo (case No. 19,282 in the court of appeals.) Unlike the other five petitioners, Mrs. Kondo did not receive the 1958 letter from the Custodian requesting submission of her original certificates of deposit together with the advice that her claim would be treated as

ARGUMENT

Notwithstanding the express provisions of the Trading With the Enemy Act providing that the sole relief and remedy for debt claims under that Act is an action brought within sixty days of the administrative denial of those claims, petitioners waited more than two and one-half years before filing these suits for judicial review. They seek to avoid the Congressional directive that "suits for the satisfaction of debt claims shall not be instituted, prosecuted, or further maintained except in conformity with this section" by urging that respondent was "equitably estopped" from raising that defense. This argument was rejected by the court below both on the ground that the doctrine of equitable estoppel cannot enlarge

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abandoned if she did not do so. That letter had, inadvertently, been misaddressed by the Alien Property Office. The "Final Schedule" and accompanying letter advising that her claim had been disallowed and of her right to seek judicial review within sixty days were correctly sent by registered mail to the address Mrs. Kondo had designated. Those papers were not returned by the Post Office as undeliverable. However, Mrs. Kondo informs us that in fact she did not receive that notice either, apparently because in the interim she had moved without informing the Alien Property Office of her changed address. Mrs. Kondo asserts that, had she received any notice, she would have submitted her certificates to the Custodian and timely prosecuted her claim, just as she had done with her similar debt claim against the vested assets of another Japanese Bank (J.A. 50-51). It seems apparent that, but for the unfortunate confusion as to Mrs. Kondo's correct mailing address, she would have been included in the *Abe* settlement. The Attorney General has accordingly advised counsel for Mrs. Kondo that he stands ready to make payment to her on the basis of the *Abe* settlement, as she seeks in her complaint (J.A. 43).

the limitations provisions of that Act, and on the ground that "the record does not support [that] contention" factually (Pet. 26). We believe that the decision of the court of appeals is correct. In addition, it is clear that the case does not present a recurring issue.

1. These suits against respondent, as successor to the Alien Property Custodian, are in reality actions against the United States.[6] It is well settled that Congress may prescribe limitations and conditions upon which suits against the government may be brought and that failure to comply with those limitations is jurisdictional.[7] Suits under the Trading With the Enemy Act are no exception.[8]

Petitioners do not deny that they failed to seek judicial review "within sixty days" as required by Congress. Rather, they invoke the doctrine of "equitable estoppel." That doctrine rests on the maxim that no man may take advantage of his own wrong; thus, in actions between private litigants, one who

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[6] *Banco Mexicano* v. *Deutsche Bank*, 263 U.S. 591, 602-603; *Codray* v. *Brownell*, 207 F.2d 610 (C.A. D.C.), certiorari denied, 347 U.S. 903.

[7] *Soriano* v. *United States*, 352 U.S. 270, 276; *United States* v. *Sherwood*, 312 U.S. 584, 590-591; *Munro* v. *United States*, 303 U.S. 36.

[8] See *Soriano* v. *United States*, *supra*, 352 U.S. at 276; *Legerlotz* v. *Rogers*, 266 F. 2d 457 (C.A. D.C.), certiorari dismissed, 362 U.S. 938; *Brownell* v. *Nakashima*, 243 F.2d 787, 792 (C.A. 9), certiorari denied, 355 U.S. 872; *Cisatlantic Corporation* v. *Brownell*, 131 F. Supp. 406, 407 (S.D. N.Y.), affirmed, 222 F.2d 957 (C.A. 2).

has caused his opponent to forbear suit by lulling him into believing he has a longer time in which to commence his action may not later defend on the ground that the statute of limitations has in fact expired. *Glus* v. *Brooklyn Eastern Terminal*, 359 U.S. 231, 232-233. However, it has been repeatedly held that the doctrine may not be invoked to toll the period of limitations in suits against the government; the statutory limitations governing such actions are jurisdictional and may not be waived by conduct of agents of the United States. *E.g.*, *Munro* v. *United States*, 303 U.S. 36, 41; *United States* v. *Michel*, 282 U.S. 656; *Pittman* v. *United States*, 341 F.2d 739 (C.A. 9), certiorari denied, 382 U.S. 941; Accord: *Automobile Club* v. *Commissioner*, 353 U.S. 180, 187.[9] Invocation of that doctrine to toll the period of limitations under the Trading With the Enemy Act would seem particularly inappropriate since the Act expressly provides that the "sole relief and remedy available"

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[9] To the same effect, see *Anderegg* v. *United States*, 171 F.2d 127, 128 (C.A. 4), certiorari denied, 336 U.S. 967; and *Wallace* v. *United States*, 142 F.2d 240 (C.A. 2), certiorari denied, 323 U.S. 712. Cf. *Andreae* v. *Redfield*, 98 U.S. 225. *Stockstrom* v. *Commissioner*, 190 F.2d 283 (C.A.D.C.), and *Vestal* v. *Commissioner*, 152 F.2d 132 (C.A.D.C.), cited by petitioners, were suits by the United States for the collection of taxes, not suits against the United States. Indeed, the decision in *Stockstrom*, *supra*, has been expressly disapproved by this Court. *Automobile Club* v. *Commissioner*, 353 U.S. 180, 183-184. In *N. V. Philips, etc.* v. *Atomic Energy Commission*, 316 F.2d 401 (C.A.D.C.), also relied on by petitioners, the court ruled that the general limitation period of 28 U.S.C. 2401(a) for bringing suit against the United States did not govern the time within which an administrative claim for compensation had to be presented to the Commission.

for review of administrative decisions under the Act is an action brought within sixty days pursuant to section 34(f), and that suits shall not be instituted except in conformity with that section. 50 U.S.C. App. 34(f) and 34(i). The only other pertinent decision under the Trading With the Enemy Act similarly holds that a claim of equitable estoppel is unavailable. *Legerlotz* v. *Rogers*, 266 F.2d 457 (C.A.D.C.), certiorari dismissed, 362 U.S. 938. There is no occasion for review of that issue now, when the program under the Act has been substantially completed.[10]

2. In all events, as the court of appeals ruled, petitioner has made no factual showing which would warrant a holding of estoppel even as between private litigants. Petitioners concede, as they must, that neither respondent nor any of his agents at any time advised petitioners that there was no need for them to avail themselves of judicial review in order to preserve their claims. On the contrary, the only communications from respondent to petitioners written prior to the expiration of their statutory time to appeal to the courts were precisely to the opposite effect. The Custodian's initial letter to each petitioner (Pet. 33, J.A. 6, 29) stated that he intended to apply the

[10] On June 29, 1966, the President announced that the Office of Alien Property in the Department of Justice would close as of June 30, 1966. Remaining matters are to be handled by the part-time work of personnel in the Civil Division of the Department of Justice. As of April 30, 1966, there were pending some 50 administrative claims, 450 accounts, and 30 cases in litigation. See Report of Office of Alien Property—Message from the President, 112 Cong. Rec. 14095 (daily ed., June 30, 1966).

post-war rate of exchange to the *yen* deposit claims in question under the "Judgment Day" rule of *Deutsche Bank* v. *Humphrey*, 272 U.S. 517, and set forth the resultant dollar amount of each claim which he proposed to allow. These letters also advised petitioners that they could protest the proposed decision administratively if they so desired (Pet. 34-35) and that, when a final payment schedule was issued, they would be entitled to challenge the administrative determination in the district court. In addition, respondent informed petitioners of the provision of the United States Code which governed their right to judicial review, the court in which such review was to be sought, and the time within which the complaint had to be instituted. Indeed, the Custodian's letter, introduced by petitioners in the courts below as "typical of that sent to each of the plaintiffs" (J.A. 2), indicates that the Custodian simultaneously sent copies of the foregoing letters to petitioners' counsel. See, Pet. 36; J.A. 9 and 32.

The Custodian's second letter (J.A. 34)—which accompanied the final schedule of payments—advised each petitioner that "[i]f your claim is not shown on the Schedule, it is for the reason that the claim has been dismissed and disallowed by this office." It then went on to advise them, once again, of the authority, time, and procedure to challenge the administrative ruling in federal court.[11] No other commu-

[11] To be sure, respondent had requested in each initial letter that claimant's original certificates of deposit be submitted to him prior to payment or to forward a notarized statement of

nication is alleged to have taken place during the relevant period. Thus, the fundamental requirements of estoppel—a representation and change of position in reliance thereon [12]—are not present here. At no time did the Custodian represent that he would allow petitioners' debt claims other than at the post-war *yen* exchange rate. Consequently, petitioners could not have been relying on any assurances or representations by the Custodian when they did not seek judicial review of his ruling. In these circumstances, the court of appeals correctly stated (Pet. 25):

> Their failure to act cannot, we feel, be attributed to any misrepresentation, either affirmatively or negatively, by the [respondent]. Whatever may have prompted the [petitioners'] action, or lack

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why claimant could not submit the certificate. There was nothing arbitrary about this request. Since payment of those certificates was available in Japan, it was not unreasonable to assume that a claimant's unexplained lack of an original deposit certificate indicated he had previously obtained payment elsewhere. No bank would honor such a claim without similarly protecting itself against double payment by recovering the original obligation. Moreover, the submission of those certificates could hardly constitute an acquiescence in the Custodian's ruling in the face of the express provision in the letter requesting their submission that the certificates could be accompanied by "a statement of your objections to the allowance of the claim in the amount stated" (Pet. 35). Finally, *after* petitioners had failed to submit their certificates to the respondent, they were advised again of their right to judicial review (J.A. 34). Thus, the request for those certificates hardly served to lull petitioners into believing they could no longer bring a timely suit under section 34.

[12] See 3 Pomeroy, *Equity Jurisprudence* § 805 (5th Ed., 1941).

of action, we conclude it was not any misleading act or inaction on the part of the Government.[13]

3. In the litigation involving the claimants who took a timely appeal from the administrative decision that the "Judgment Day" rule required the application of the post-war *yen* rate of exchange to their claims, the government prevailed both in the district court and in the court of appeals. *Aratani* v. *Kennedy*,

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[13] Petitioners' suggestion (Pet. 15, fn. 7), that the sixty-day period in which to seek judicial review of respondent's denial of their claims is constitutionally inadequate is similarly without merit. In the first place, they were warned by the initial letters in 1958 and 1959 of the substance of the administrative determination. This was more than two years prior to the final administrative decision.

At any rate, a sixty-day period is the usual time prescribed for an appeal to the court from the ruling of a federal administrative agency. Thus, for example, a sixty-day period for filing a petition or complaint for review is prescribed by the Review Act of 1950, 5 U.S.C. 1031, 1034, with respect to the Federal Communications Commission, the Maritime Administration, and certain orders of the Secretary of Agriculture. Similarly, petitions for the review of orders of the Federal Trade Commission (15 U.S.C. 45(c)), the Securities and Exchange Commission (15 U.S.C. 78y), the Civil Aeronautics Board (49 U.S.C. 1486), the Federal Power Commission (16 U.S.C. 825*l*(b)), and the Secretary of Health, Education and Welfare under the Social Security Act (42 U.S.C. 405(g)), must be brought within 60 days from the the final order of the administrator. See also 7 U.S.C. 608c(15)(B), limiting to 20 days the time in which to seek review of certain marketing orders promulgated by the Secretary of Agriculture. See 3 Davis, *Administrative Law Treatise* § 23.03 (1958). Sixty days is also the time in which to appeal to a court of appeals in a case in which the United States or an officer or agency is a party. Rule 73(a), Federal Rules of Civil Procedure.

supra. Had that litigation been pressed to a conclusion in this Court and the decisions of the lower courts reversed, petitioners' claims would not have been affected. A reversal on appeal does not inure to the benefit of parties who do not join in the appeal. *Ackermann* v. *United States*, 340 U.S. 193; *Annat* v. *Beard*, 277 F. 2d 554 (C.A. 5), certiorari denied, 364 U.S. 908. Petitioners are in no better position because, in lieu of continuing that litigation further, the parties to that protracted proceeding believed their interests best served by a compromise settlement.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for certiorari should be denied.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1966

No. 164

AYAKO HONDA, ET AL., AND MASAE KONDO, ET AL.,
Petitioners,

v.

NICHOLAS DeB. KATZENBACH, ATTORNEY GENERAL OF THE UNITED STATES, *Respondent.*

REPLY FOR PETITIONERS

1. The Opposition confirms the essential facts as set out in the Petition,[1] and impliedly confirms by its silence the hardship and injustice to petitioners recognized by both opinions in the Lower Court. However, by reiteration that the Government did not misrepresent or mislead petitioners during the 20 years when their claims were under administrative review, the Opposition seeks to obscure the injustice of denying petitioners the same relief afforded their fellow claimants in 1964 following this Court's grant of certiorari in *Aratani*.

[1] A passing reference in the Opposition (p. 8) may create the misimpression that the numerous petitioners represented in this class action had counsel in 1961 while the statutory limitation period was running. In fact, in 1961 counsel for Honda (see J.A. 9) only represented some 50 claimants, and review of a sample of the files submitted for inspection by the Department of Justice shows that a majority of the 4,100 petitioners were not represented by *any* counsel.

But the Government is simply in error in making misrepresentation the *sine qua non* of equitable estoppel. As emphasized in the dissenting opinion below (Petition, pp. 40, 43), this "most powerful and flexible instrument" cannot be so narrowly circumscribed, particularly in view of this Court's *New York Central* opinion making "given circumstances" in particular situations the criteria for the tolling of limitations. Thus, while misrepresentation provides strong grounds for equitable estoppel or tolling, an equally compelling case arises where the Government wears out thousands of claimants for refund of seized assets with 20 years of administrative delay, finally offering a few pennies' return for their original deposit certificates. Estoppel of limitations under these circumstances is compelled by a confluence of striking equities: that petitioners were confused and discouraged by the Government's long delay, offer of 2% return, and prolix instructions; that delay in suit was entirely excusable and caused no prejudice; that the validity of their statutory claims has been and remains unquestioned; that funds are on hand for their payment; and that the divestiture of the right to return constitutes a manifest injustice recognized even by the majority below (Petition, p. 30). And, beyond all these equities, the circumstances also pose a *traditional* case of estoppel by representation and change of position in reliance; those circumstances are carefully documented in the dissenting opinion (Petition, pp. 43-45), which the Opposition does not even deign to note. They fully support Judge Wright's conclusion that the Government's reversal of its position with respect to ratio of payment following the grant of certiorari in *Aratani*, "cannot become a means, whether intentional or inadvertent, whereby innocent per-

sons who acted in reliance upon the Government's first representation, should be denied the opportunity to recoup monies which Congress wanted returned."[2]

2. The Opposition (pp. 14, 16) submits that this case "does not present a recurring issue," because "the program under the Act has been substantially completed." True, the Court Below ruled that equitable estoppel is not available against a Government plea of limitations under the Trading With the Enemy Act, but nothing in the ruling confines it to that particular statute. Rather, the majority opinion's self-denying stricture against invoking equity powers is based on the generalization that the Government is immune from estoppel and tolling principles such as this Court recently (in *Glus* and *New York Central*) made applicable to private parties in civil litigation. Moreover, even if the majority opinion's "no estoppel against the Government" ruling *had been* limited to the Trading With the Enemy Act, that ruling itself divests these 4,100 loyal citizens of a return of their seized bank deposits. In view of the forfeiture thus inflicted upon so many blameless persons, it could hardly be suggested that

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[2] The Opposition (pp. 14-15) cites a number of cases decided before *Glus* and involving no estoppel claims, wherein Government pleas of limitations were upheld. But the predicate of the cases as tendered by the Government—that statutory limitations are "jurisdictional"—has been rejected by this Court in *Glus* as unpersuasive when estoppel is appropriate (359 U.S. at 234-35, n. 11). Moreover, most of the cited decisions merely bar the Government from liability based upon representations or promises of its agents in excess of their statutory authority. We agree here, as we did in the Court Below, that the United States is not liable for the acts of its officers who "enter into agreements to do what the law does not sanction or permit". But that rule simply has nothing to do with the availability of estoppel or tolling against an inequitable Government plea of limitations.

this is a case of merely individualized injustice unworthy of this Court's concern.[3]

3. Finally, it is notable that the Opposition (p. 19, n. 13) misstates instead of answering petitioners' constitutional point. That point (see Petition, pp. 15-16) is not that a 60-day period of limitation "is constitutionally inadequate"; rather, it is that a significant Fifth Amendment issue arises if the Government can summarily seize private property and then may (because of "sovereign immunity") successfully plead a slim limitations period in bar of relief under equitable circumstances which would estop a private-party defendant. In the Government's view, it may seize property without judicial process, consume twenty years in administrative review of claims upon the seized funds, and then hide behind inexorable limitations to reject a citizen's concededly valid claim no matter how reasonable was delay in suit and how unjust may be the resulting divestiture. We cannot bring ourselves to believe that sovereign immunity allows such Government taking and keeping with impunity.

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[3] The Government advises this Court (Opposition p. 12, n. 5) that the Attorney General now "stands ready to make payment" of the amount claimed in petitioner Kondo's suit, whose dismissal the Court Below affirmed. This back-door confession of error—compelled by the manifest indefensibility of the Government's refusal to pay this claim (see Petition p. 10, n. 5)—was first made in a letter offer by the Attorney General to petitioners' counsel after the Petition for Certiorari had been filed in this Court and while the Government was preparing its Opposition. The eleventh-hour offer is reminiscent of the Government's 1964 *Aratani-Abe* settlement (at 100% of the principal) with the claimants in those cases following this Court's grant of certiorari. See 375 U.S. 877; 376 U.S. 936; 380 U.S. 938; Petition, p. 3. Apparently the Government pursues a game of litigating brinkmanship, doing justice in single unconscionable OAP cases when faced with the likelihood of this Court's remedial review, and affording justice to a larger number of deserving claimants only when certiorari has been granted.

A meritorious issue for review is presented under any circumstances by a ruling that courts are powerless to estop or toll limitations pleas by the Federal Government. Certiorari is doubly appropriate when such a ruling comes in a case of summary Government seizure of private funds and innocent citizens are unjustly barred from restitution. It is triply so, as underlined by the "Memorandum of the State of California as Amicus Curiae", when the wronged citizens are the same class of persons who suffered so much in the past at the hands of the Government which seized their bank deposits and now inexplicably resists their return.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

AYAKO HONDA, ET AL., *Petitioners,*

v.

NICHOLAS DeB. KATZENBACH, ATTORNEY GENERAL OF THE UNITED STATES, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONERS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 164

AYAKO HONDA, ET AL., *Petitioners,*

v.

NICHOLAS DeB. KATZENBACH, ATTORNEY GENERAL OF THE UNITED STATES, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONERS

Opinions Below

The majority and dissenting opinions in the Court of Appeals for the District of Columbia Circuit, issued on January 13, 1966, are reported at 356 F. 2d 351 and appear in the Record at pp. 69 to 99.

Jurisdiction

The opinion and judgment of the Court of Appeals for the District of Columbia Circuit were entered on January 13, 1966, and a timely petition for rehearing was denied by

order of February 24, 1966 (R. 100-102). The petition for writ of certiorari was filed on May 23, 1966 and was granted on October 24, 1966 (R. 102). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Question Presented

The court below denies thousands of Japanese-American citizens return of their seized savings deposits because of the Government's plea of a 60-day statute of limitations, despite the fact that the Government long ago recognized their right to repayment and has the funds available therefor. The question presented is whether, in a suit under the Trading With the Enemy Act, federal courts are precluded from applying equitable estoppel or tolling against the Government's limitations plea in circumstances where such a limitations plea by a private litigant would be estopped to prevent a fundamental injustice.

Statute Involved

Section 34(f) of the Trading With the Enemy Act, 60 Stat. 925 (1946), 50 U.S.C. App. § 34(f), provides in part:

> "If the aggregate of debt claims filed as prescribed exceeds the money from which, in accordance with subsection (d) hereof, payment may be made, the Custodian shall prepare and serve by registered mail on all claimants a schedule of all debt claims allowed and the proposed payment to each claimant. In preparing such schedule, the Custodian shall assign priorities in accordance with the provisions of subsection (g) hereof. Within sixty days after the date of mailing of such schedule, any claimant considering himself aggrieved may file in the District Court of the United States for the District of Columbia a complaint for review of such schedule, naming the Custodian as de-

fendant . . . Any interested debt claimant who has filed a claim with the Custodian pursuant to this section, upon timely application to the court, shall be permitted to intervene in such review proceedings. The court shall enter judgment affirming or modifying the schedule as prepared by the Custodian and directing payment, if any be found due, pursuant to the schedule as affirmed or modified and to the extent of the money from which, in accordance with subsection (d) hereof, payment may be made. Pending the decision of the court on such complaint for review, and pending final determination of any appeal from such decision, payment may be made only to an extent, if any, consistent with the contentions of all claimants for review."

Statement

It is a rare case wherein a federal Court of Appeals concedes the presence of manifest injustice but finds itself without authority to cure it. This is such a case. In the same breath the majority opinion below recognizes that "unique and unfortunate circumstances which have deprived these appellants of their deposits in the Yokohama Specie Bank command sympathetic consideration of their problem" (R. 83), and then finds federal courts powerless to prevent injustice by estopping or tolling the 60-day statute of limitations of the Trading With the Enemy Act.

The court below thereby leaves divested of judicial redress thousands of Japanese-Americans seeking a return of their savings accounts seized on Pearl Harbor Day, even though their debt claims have long been recognized by the Government as valid and adequate vested funds are on hand for their payment. The court's self-denying ordinance causes American citizens to forfeit their statutory debt-claim rights because in 1961, 20 years having elapsed after

Pearl Harbor Day before the Government finally adjudicated their claims, petitioners delayed more than 60 days in filing suit against the Department of Justice while awaiting resolution of the yen-dollar ratio issue then pending in litigation. See *Aratani* v. *Kennedy*, 317 F. 2d 161; No. 321, October Term, 1963; *Abe* v. *Kennedy*, Civ. Action 2529-61 (D.C. D.C.).[1] We set forth below the sequence of events which present the question whether federal courts are precluded from achieving an equitable result by estopping or tolling a limitations period pleaded by the Federal Government under the Trading With the Enemy Act.

1. *Seizure and Vesting*

Petitioners are thousands of residents and citizens of the United States, persons of Japanese ancestry, who had individual yen deposit accounts in 1941 in the California Branch of the Yokohama Specie Bank, Ltd. Their yen certificates, issued in the United States in exchange for dollar deposits, were redeemable in dollars at the Bank in the United States or in yen at the Bank's offices in Japan (R. 1). On December 7, 1941, California seized the domestic assets of the Yokohama Specie Bank as enemy property, and in 1943 those assets, including the funds petitioners had on deposit, were "vested" under the Trading With the Enemy Act (see 8 Fed. Reg. 5608).

During the war, petitioners could not, of course, obtain payment from the Yokohama Bank in Japan. The Government having taken the Bank's domestic assets, peti-

[1] The *Aratani* litigation, which was before this Court at its 1963 Term, involved the yen-dollar ratio issue as raised by depositors in the Sumitomo Bank. The *Abe* suit involved petitioners' fellow-depositors in the Yokohama Specie Bank, Ltd. Because the OAP's Sumitomo Bank schedule was first published, the *Aratani* case proceeded to this Court while the subsequent *Abe* suit remained in the District Court awaiting the outcome of *Aratani*. When *certiorari* was granted in *Aratani*, and the Government thereupon settled that case, it simultaneously settled *Abe* (see pp. 8 to 10, *infra*).

tioners' choses in action were effectively seized by the Government while the yen-dollar exchange rate declined by the end of the war to less than 2% of pre-war value, where it remains today. While their savings accounts thus remained "frozen" and unavailable, most of the petitioners were evacuated from the West Coast, many to work as farm laborers. Illustrative is the case of petitioner Michiko A. Terao, whose affidavit discloses (R. 15) that although she was the wife of a member of the United States Army who was wounded in battle, awarded the Purple Heart, and became permanently paralyzed by his battle injuries, during the war she was evacuated to Colorado with minimum personal belongings to work as a sharecropper.[2] After the war, administrative delays consumed many more years before the OAP finally issued its ruling in 1958 (and its schedule in 1961) allowing Yokohama Bank claimants a return on their savings accounts at the 2% post-war yen-dollar conversion ratio. That formula would have afforded Mrs. Terao about 70 cents on her 220 yen deposit which had an actual value on Pearl Harbor Day of approximately $50.00 (R. 16). Ultimately, after this Court granted certiorari in *Aratani*, the Government changed its position and granted those claimants who had sued in 1961 to challenge the 2% return ratio their full original yen deposits in the Yokohama Specie Bank. But it took the position that Mrs. Terao and her thousands of fellow petitioners before this Court were precluded from a similar return because they did not sue within 60 days after the OAP's Yokohama Bank schedule to challenge the Government's 2% restitution formula.

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[2] For accounts of the mistreatement of the Japanese-Americans by the Government during the war, see *Ex Parte Endo*, 323 U.S. 283; *Acheson* v. *Murakami*, 176 F.2d 953 (C.A. 9, 1949); *Hirabayashi* v. *United States*, 320 U.S. 81; Grodzins, *Americans Betrayed* (Univ. of Chicago Press, 1949); cf. *Takeguma* v. *United States*, 156 F. 2d 437, 442 (C.A. 9, 1946).

2. *The 20-year Administrative Delay*

Following this Court's ruling in *Markham* v. *Cabell,* 326 U.S. 404, Congress amended the Trading With the Enemy Act in 1946 by codifying and regulating debt claims procedure. Some 7,500 yen deposit holders in the Yokohama Specie Bank, including petitioners herein, thereupon filed timely debt claims under Section 34 of the Act, based upon their 1941 deposit accounts in the Yokohama Bank (R. 2, 25). Thereafter, many years passed before the Government made its determination on their claims. During these years, the test case in the Department of Justice on the Yokohama Bank claims was that of *Kunio Abe,* Claim No. 55507. Therein, a Hearing Examiner ruled on January 31, 1957, that the claims were to be honored by the Custodian at the pre-Pearl Harbor conversion ratio of approximately four yen to the dollar. However, later in 1957 the Director of the OAP, with the approval of the Attorney General, overruled the Examiner and held that the proper payment formula was the post-war conversion ratio of 361.55 yen to the dollar—less than two percent of the actual value of these savings accounts when they were seized on Pearl Harbor Day (R. 2).

Following that determination, identical or very similar letters were sent in 1958 to each of the 7,500 Yokohama Specie Bank claimants (R. 6, 29, 52), wherein the Government recognized the validity of the applicant's claim (see R. 29-30) but offered to pay only at the post-war ratio of 361.55 yen per dollar. For most of the claimants, whose deposit accounts were modest, this 1958 offer of return actually was a proposal to pay only a few dollars or even pennies—frequently less than what it had cost to file the statutory claim with an authenticated copy of the yen deposit certificate (see R. 12, 13, 16). And there was added in

the OAP letter the unexplained and arbitrary demand for the surrender of each claimant's original deposit certificate.

Even a cursory reading of the OAP letter (R. 6) demonstrates the confusion, insult and arbitrariness of the Government's peremptory 1958 demand for surrender of original deposit certificates upon its offer of a 2% return on 1941 savings deposits. Worse yet, payment of even the 2% was not being offered, but was left to be effected at some indeterminate future date following publication of the OAP schedule (R. 7). Moreover, the letter volunteered the suggestion that "under the circumstances [the 2% future return], you may wish to utilize the funds in Japan rather than await settlement by this Office" and, if so, it instructed that the claim previously filed "should be canceled by signing and mailing the enclosed Notice of Cancellation of Claim card" (R. 7).

The recipients of the 1958 letter were naturally reluctant to surrender their original deposit certificates in response to a communication stating that "if you submit your original certificates of deposit to this Office, I can recommend your claim for allowance in the sum of" 2% of 1941 value (R. 29). Of the 7,500 Yokohama Bank claimants, about 1,800 sent in their original deposit certificates as requested, fewer than 1,600 returned the claim cancellation card attached to the letter, while the remaining 4,100 claimants neither withdrew their claims nor sent in their original certificates. These 4,100 claimants are petitioners before this Court. They feared to surrender their original certificates constituting their last tangible evidence of claim, believing that such surrender might constitute acquiescence in a two percent return; and because of illiteracy, poor command of English, lack of counsel, and similar reasons, many simply did not understand the complex 1958 letter of instructions from the OAP (R. 2, 3; see affidavit of Kat-

suma Mukaeda, President of the Japanese Chamber of Commerce of Southern California, R. 18-20).

In due course, after failure to receive the original deposit certificate, a notice was sent by the Government to each petitioner in 1959 advising that his claim was dismissed and referring to section 34(f) of the Act as governing "any further proceedings" (R. 33).

3. *The 1961-1964 Litigation*

In 1961 the OAP's Yokohama Bank debt claim schedule was finally published, listing at 2% of 1941 value those claims for which original deposit certificates had then been received. Within sixty days following the publication of that schedule, a suit was filed in the U. S. District Court for the District of Columbia challenging the conversion formula representing a 2% return. *Abe* v. *Kennedy*, Civ. Action 2529-61. The suit, paralleling the then pending *Aratani* litigation involving Sumitomo Bank depositors, was brought on behalf of all of the Yokohama Bank claimants appearing on the 1961 OAP schedule, and the first named plaintiff was Kunio Abe, whose claim had been the test case within the Justice Department for all of the Yokohama Bank claimants. Petitioners were unaware of the difference between those claimants on the 1961 schedule and those dropped because of failure to send in their original certificates and thus technically not within the class of plaintiffs suing in *Abe* (R. 12, 14, 16, 19). They reasonably anticipated and had a right to anticipate that if the two percent formula which had long been in administrative litigation were reversed by the courts in the *Abe* suit, all Yokohama Bank depositors who had filed timely claims under the Act which the Government had recognized as valid would be similarly compensated. That expectation was frustrated by the refusal of the Government in 1964

to make the same restitution to petitioners that it afforded the *Abe* plaintiffs in a settlement following this Court's grant of certiorari in *Aratani*.

The *Aratani-Abe* settlement came about in this way. In 1963 the Court of Appeals' *Aratani* ruling upheld the application to Sumitomo Bank debt claims of the post-war yen-dollar conversion ratio, thus limiting return to two cents on the dollar (317 F. 2d 161). *Certiorari* was sought and granted by this Court (375 U.S. 877). The Government thereupon removed the case from this Court's consideration by entering into a multi-million dollar settlement arrangement with the Sumitomo Bank plaintiffs in *Aratani*—and the Yokohama Bank claimants in *Abe*—which this Court referred to the District Court for approval (376 U.S. 936). The settlement formally approved in 1964 (228 F. Supp. 706 and see *infra*, Appendix, p. 48) represented a distribution to each *Abe* claimant of one hundred percent of his yen account at the pre-war conversion ratio, but without interest.

Prior to the *Abe* settlement with the Yokohama Bank claimants, petitioners in the case at bar had filed timely Yokohama Bank claims which OAP had recognized as valid, had awaited the resolution of *Abe* and had expected to be given the benefit of a successful outcome thereof. After the *Abe* settlement was announced but before it was approved by the District Court, petitioners asked the Department of Justice to honor their claims *on the same basis* (100% of 1941 value without interest) on which it was paying in *Abe*. They pointed out that the Government had long ago recognized the validity of their debt claims, that Yokohama Bank assets in the possession of the Government were adequate to afford them the same return given in *Abe*, and that fundamental justice required equal treatment for all similarly situated depositors. And they emphasized that the Government, having withdrawn the *Ara-*

tani test case from this Court's jurisdiction after *certiorari* had been granted, could reasonably have been expected by equal treatment among yen deposit claimants to resolve the entire issue of Japanese savings accounts without subjecting this Court to its further consideration at a subsequent date.[3] However, the Government, though it concedes the power and has the funds to make the same restitution to these claimants afforded the *Abe* plaintiffs, declined their 1964 request to do so (R. 42, 46).

4. *The Litigation Below*

Following the Government's 1964 refusal to award the benefit of the *Abe* restitution to claimants who had not transmitted their original deposit certificates between 1958 and 1961, petitioners filed this action under Section 34(f) of the Trading With the Enemy Act (R. 1) on May 19, 1964, one day following issuance of the formal order of the District Court approving the *Abe* settlement and before that order had become final (see *infra*, p. 38). The Government countered by pleading the sixty-day statute of limitations of Section 34(f). It urged in the courts below that however reasonable petitioners' conduct may have been in withholding suit while the *Abe* case was pending in the courts, the sixty days for suit inexorably expired in 1961 and the federal courts thereby lost jurisdiction to grant relief.

Petitioners' principal argument below was that where grave injustice results and no statutory purpose is served

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[3] Petitioners also emphasized to the Department of Justice, but equally without avail, their superior equities as contrasted with the claimants in the Interhandel case. Following this Court's procedural reversal in that case (*Societe Internationale* v. *Rogers*, 357 U.S. 197), the Government entered into a multi-million dollar settlement with the alien claimants, denying to the end their substantive eligibility for a return. By contrast, in the present case the Government has declined to make a return to numerous American citizens it has long ago deemed eligible for return of the amounts representing their modest savings on deposit at the time the war commenced.

by applying limitations, the District Court has power to bar the Government's plea of limitations under the doctrine of equitable estoppel recently confirmed in *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231, or the doctrine of tolling recognized in *Burnett* v. *N. Y. Central R. Co.*, 380 U.S. 424. In that respect it was urged (see R. 75, 79-81):

(i) that petitioners, who had awaited the outcome of the *Abe* case, differed from the plaintiffs in *Abe* only in their failure to comply with the Government's wrongful demand: the confusing, insulting, and arbitrary 1958 demand for the surrender of original deposit certificates in connection with a legally inadequate offer of a two percent return;

(ii) that petitioners were fully justified in declining to surrender their original deposit certificates in 1958 which the Government peremptorily demanded in conjunction with its 2% offer and that their failure to sue while *Abe* was in litigation was excusable delay in view of their reasonable reliance upon the Government's power and duty to treat them equally with their fellow-claimants in *Abe*;

(iii) that there was no prejudice whatsoever from delay in suit between 1961 and 1964, since the vested Yokohama Bank fund to which petitioners look for return had simply remained dormant in the possession of the Government, just as it had for the preceding twenty years;

(iv) that, where the obligation of suit arises in the first instance from summary Government seizure of private property without judicial process, a serious Fifth Amendment issue arises if Congress is deemed to have precluded any equitable estoppel or tolling of the 60-day limitation of the Act.

But the District Court dismissed the petitioners' suit for lack of jurisdiction (R. 36, 66), accepting the Government's

argument that, because of sovereign immunity, estoppel against limitations does not lie under a statute authorizing suit against the United States. Dividing 2 to 1, the Court of Appeals affirmed the District Court's ruling, chiefly on the ground that "estoppel cannot be used against the Federal Government" (R. 78). The majority opinion below purports to answer the Fifth Amendment objection to Government immunity from estoppel under this Act by stating (R. 80-81) that no due process is due petitioners because, as mere savings-depositor "creditors" of the Yokohama Bank, it is not their property which the Government has appropriated and accordingly they have "no property right" in the vested assets. In so holding the majority below refused to recognize that the Government's taking of all the assets of the Yokohama Bank in this country was in effect the seizure of the depositors' rights against the bank—manifest property rights. And the majority opinion obscures the fact that by the taking of the domestic assets of the Yokohama Bank during the war, petitioners were precluded from redeeming their deposit certificates during the years that the value of the yen dropped to 2% of the 1941 exchange rate.

A detailed critique in the dissenting opinion of Judge Wright (R. 89-99) emphasizes that this Court's decision in *Burnett* v. *N. Y. Central R. Co.*, 380 U.S. 424, makes estoppel or tolling of limitations hinge on broad principles of equity. It points out that in fact the Government represented to all Yokohama Specie Bank claimants in 1958 that no more than 2% was available on a return of their yen savings accounts, and that petitioners are now seeking to rely upon the change of the Government's position in 1964 when it settled with their fellow claimants in *Abe* at full value following this Court's grant of *certiorari* on the conversion ratio issue. Judge Wright carefully reviews authorities demonstrating the error of the view that limi-

tations estoppel cannot be applied to the Federal Government, and concludes that in the circumstances of this case the federal courts have power to prevent "a potential injustice of substantial proportion" (R. 97). With both the majority and minority agreeing on the unjust outcome below, the issue here is whether judicial power is too limited to achieve what all agree should be the fair result.[4]

Summary of Argument

A

The Government rests its case largely upon the proposition that sovereign immunity exempts the United States from estoppel and tolling in civil litigation. But this proposition so heavily relied on by the Government is wrong in general and is wrong in particular as applied to the statute here involved. For, not only do reason and precedent reject the general proposition that tolling and estoppel are un-

[4] Petitioner Kondo differs from the class of petitioners represented by petitioner Honda only in that she received neither the 1958 letter from the Government requesting surrender of her original certificate nor the 1959 notice that her claim had been dismissed (R. 42). The reason for this was that the Government had misaddressed those two communications (R. 47). Moreover, having failed to furnish the Government with a change of address notice, Mrs. Kondo also did not receive the 1961 Yokohama Bank schedule which was mailed to an address where she then no longer resided. Nevertheless, adhering to its statute of limitations argument to the point of *reductio ad absurdum*, the Government contended that if Mrs. Kondo had given notice of change of address she would have received the 1961 OAP schedule which, standing alone, would have been adequate statutory notice to commence running of the sixty-day limitation of Section 34(1). Accordingly, the Government refused to honor Mrs. Kondo's 1964 request for a return and those of others similarly unnotified, and successfully argued in the court below that the 60-day limitations period barred her 1964 suit. Only after the petition for certiorari had been filed in this Court did the Government shift its position and announce its readiness "to make payment" to Mrs. Kondo (Opposition p. 12, n. 5). The Government's backdoor confession of error in *Kondo* commendably recognizes the stark injustice of its rigorous application of limitations. But it remains unclear, even at this stage of the litigation, why the same considerations do not call for a like confession for all the petitioners before the Court.

available against limitations pleaded by the Government, but in the case at bar both the Constitution and the Trading With the Enemy Act require the application of tolling or estoppel, whatever the general rule might be in other circumstances.

To avoid Fifth Amendment invalidity in a case arising from Government taking of private property, every presumption should be indulged against the inference that sovereign immunity precludes an equitable suspension of limitations necessary to avoid a grave injustice. In its appropriation of the Yokohama Specie Bank's assets, the Government has taken petitioners' property and has directly affected their property interests. Fair opportunity for recoupment is all that saves the original taking from constitutional invalidity. The constitutional rights of just compensation and due process cannot be abridged by the harsh and inequitable application of statutes of limitations. This Court should indulge every presumption against the inference of Congressional intent to immunize the Government from equitable tolling or estoppel of this Act's limitation period.

Actually, far from preserving sovereign immunity, Congress made such normal rules of civil litigation as limitations tolling applicable under the Trading With the Enemy Act. Most significant in appraisal of the Government's plea for immunity from equitable tolling and estoppel is the absence of a single word in the Act or its history which would support such an exemption. On the contrary, both Section 33 and 34(a) of the Act expressly apply limitations tolling in certain instances, and the House Judiciary Committee emphasized "fairness" and "practical sense" in recommending these tolling provisions.

But were this Court somehow unpersuaded by the special constitutional and statutory circumstances here involved,

it is also clear that even in an ordinary "suit-against-the-sovereign" situation, once Congress has permitted suit against the United States neither reason nor precedent support Government exemption from equitable suspension of limitations. In appropriate circumstances federal courts have tolled and estopped Governmental pleas of limitations under various federal enactments; and, in at least one such instance, the decision has been cited with approval by this Court. See *infra*, p. 28. Moreover, this Court in *Stearns Co.* v. *United States*, 291 U.S. 54, 59-61, estopped a plea of limitations on behalf of the Government against a delinquent taxpayer; we cannot believe that in civil litigation the Government can be exempt from rules it invokes against others, and which are generally available between private litigants. When the Government becomes a defendant following Congressional authorization of suit against it, the statutory limitation period is amenable to equitable tolling and estoppel in appropriate circumstances.

B

In the circumstances of this case, tolling or estoppel of limitations is required to prevent manifest injustice and afford to eligible claimants the restitution Congress commanded. *Burnett* v. *N.Y. Central R. Co.*, 380 U.S. 424, cites a variety of circumstances under which estoppel or tolling is called for by "the interests of justice" and prescribes that fundamental considerations of justice provide the guiding norm to be applied in each case as it presents its individualized equities.

It is clear that there are here presented the strongest considerations calling for equitable suspension of the Act's normal 60-day limitation. Here (1) petitioners relied on the Government's initial offer of restitution at the 2% post-war conversion ratio and seek recovery based on its change

of position in 1964 after this Court's grant of review in *Aratani;* (2) between 1961 and 1964 petitioners reasonably awaited the outcome of the *Aratani-Abe* litigation, anticipating equal treatment following its resolution, and when equal treatment was refused they filed this suit before expiration of the *Abe* litigation; (3) the Government was from the first implicated in petitioners' "delay" by the 20 years which elapsed before OAP issued its controlling administrative ruling, and by its confusing, burdensome, and discouraging representations and demands upon petitioners; and (4) sheer injustice results if the Government may abuse limitations in the present suit to bar recovery by citizens whose statutory eligibility for restitution has long been conceded.

Each of these four salient considerations would suffice to invoke an estoppel or tolling on behalf of petitioners whose delay in suit was at most an immaterial technical default. But, when all four considerations are taken together, an overwhelming case for tolling and estoppel is made out. And, if all this were still not enough, there remains the underlying constitutional concern for the fullest rights of restitution following summary Government seizure of private property.

Argument

The refusal of the majority below to sanction a suspension of limitations rests principally on its view that, notwithstanding the admittedly unjust result, a suspension of limitations cannot be applied to the Federal Government. As we demonstrate in Point I below, there is neither reason nor precedent for granting general Government immunity from limitations tolling and estoppel, and indeed a major Fifth Amendment issue would arise from such immunity following summary Government seizure and vesting of pri-

vate property. The majority below also questions whether the facts of this case warrant the application of estoppel or tolling. In Point II we demonstrate that the test of limitations suspension adopted by the majority is far too narrow and that compelling considerations of fundamental justice and preservation of the Congressional intention to redress legitimate debt claims require tolling or estoppel of the 60-day limitations period in this case.

I

Equitable Tolling or Estoppel of the Trading With the Enemy Act's Limitation Period Is Not Barred by Sovereign Immunity.

In this case the Government concedes—as it must in view of the rulings in *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231 and *Burnett* v. *N.Y. Central R. Co.*, 380 U.S. 424 (and see *infra*, p. 24, n. 6)—that limitations prescribed by federal statutes may in appropriate circumstances be judicially tolled or estopped. Nor has the Government cited any text or legislative history of the Trading With the Enemy Act intimating that its 60-day limitation period is somehow less susceptible to tolling or estoppel in appropriate circumstances. Instead of legislative evidence as to the meaning of the Trading With the Enemy Act, the Government has claimed a universal rule that sovereign immunity exempts the United States from estoppel and tolling in civil litigation. Accepting that view, the majority opinion in the court below holds (R. 78) that "estoppel cannot be used against the Federal Government" to overcome a limitations period.

That view is erroneous. Should this Court be required to rule on the general question whether tolling and estoppel are available against the Federal Government's plea of limitations, we demonstrate in a succeeding subsection

(*infra*, pp. 27 to 30) that any general exemption from limitations suspension is unsupported by reason or precedent and is actually contravened by judicial authorities which have tolled and estopped limitations pleaded by the Government. But, apart from the general question, there is particular evidence here that Congress in the Trading With the Enemy Act accepted the principle of limitations tolling (see *infra*, pp. 24 to 27). And, in any event, there is here a fundamental constitutional reason for construing this Act to permit rather than to preclude limitations suspension necessary to avoid a serious injustice. For, with respect to claims upon private property summarily seized and appropriated by the Government, it is not sovereign *immunity* but the Fifth Amendment's requirement of sovereign *liability* which is controlling. When the just compensation clause of the Fifth Amendment applies, the Government is "bound to pay" because the clause itself is a constitutional waiver of any immunity which might otherwise exist. See *Alabama* v. *United States*, 282 U.S. 502, 507; *Phelps* v. *United States*, 274 U.S. 341, 343; *Becker Steel Co.* v. *Cummings*, 296 U.S. 74, 79-80.

Under the just compensation proviso of the Fifth Amendment as well as its due process guarantee, the Government's summary seizure of private property and its 20 year delay in ruling upon rights of return, become constitutionally impaired if the citizen is then reduced to an inexorable requirement for suit within 60 days notwithstanding excusable reasons for delay and the injustice of applying the time-bar.[5] The constitutional right of just

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[5] ". . . it has been held that statutes of limitations must give a party a reasonable time to sue, and if a particular statute should fail to do so it would be within the competency of the courts to declare the same unconstitutional and void." *Campbell* v. *Haverhill*, 155 U.S. 610, 615. In the present case any constitutional doubt about the adequacy of a 60-day

compensation cannot be abridged by the harsh and inequitable application of statutes of limitations. The summary appropriation context of the present case thus places direct constitutional inhibitions on sovereign immunity and it renders unnecessary a ruling by this Court, beyond the confines of this statute, on the Government's general vulnerability to equitable tolling and estoppel in a genuine sovereign immunity situation.

1. *To Avoid Fifth Amendment Invalidity, Every Presumption Should Be Indulged Against the Inference that Under this Statute Sovereign Immunity Precludes Equitable Suspension of Limitations.*

The summary seizure and vesting of property which preceded enactment of the Trading With the Enemy Act's 1946 provisions preclude assertion of any sovereign immunity against fair subsequent opportunity for judicial review of claims upon the seized assets. That teaching of this Court's early ruling in *Central Union Trust Co.* v. *Garvan*, 254 U.S. 554 at 566, was recently enlarged upon in *Societe Internationale* v. *Rogers*, 357 U.S. 197. There, this Court emphasized that it is only because of the existence of subsequent judicial review that the original Government seizure of enemy property is "*rescued from constitutional invalidity*". Concerning the particular procedural fairness issues there presented the opinion explained (at pp. 210-211):

> "Their gravity is accented in the present case where petitioner, though cast in the role of *plaintiff*, cannot be deemed to be in the customary role of a party

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limitations period is avoided by a reading of the statute which permits reasonable extension in appropriate circumstances by equitable tolling or estoppel.

invoking the aid of a court to vindicate rights asserted against another. Rather petitioner's position is more analagous to that of a *defendant*, for it belatedly challenges the Government's action by now protesting against a seizure and seeking the recovery of assets which were summarily possessed by the Alien Property Custodian without the opportunity for protest by any party claiming that seizure was unjustified under the Trading with the Enemy Act. Past decisions of this Court emphasize that this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a nonenemy claimant a later judicial hearing as to the propriety of the seizure. See *Stoehr* v. *Wallace*, 255 U.S. 239, 245-246; *Guessefeldt* v. *McGrath*, 342 U.S. 308, 318; cf. *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481, 489."

This Court has thus made explicit the necessity of subsequent judicial review to save summary Government appropriation from fundamental invalidity under the Fifth Amendment. Nor has the Government in this case, in claiming sovereign immunity from estoppel and tolling, sought to dispute that proposition. Instead, it has denied that its claim of immunity has created a Fifth Amendment issue, arguing that petitioners as depositors in the Yokohama Bank were in a mere debtor-creditor relationship to it and therefore the Government never seized "their" property. The majority below went astray (R. 80) when it adopted this faulty answer to petitioners' Fifth Amendment objection to Government immunity from tolling or estoppel. For, in its appropriation of the Yokohama Bank's

assets the Government has also taken petitioners' property and it has directly affected their property interests.

We submit that, within the meaning of the Fifth Amendment, the seizure and vesting of the assets of the California branch of the Yokohama Bank constituted a taking not only of the property of the Bank but also of the property of its savings depositors. After all, the just compensation clause is not an exercise in common law technicalities but a guarantee that the Government will make whole those who have been injured by its appropriation of private property. Certainly the appropriation of the entire domestic assets of the Yokohama Specie Bank, Ltd., including petitioners' aggregate deposits therein, was in every practical effect a taking of petitioners' property. At the very least, when the Bank's assets were permanently appropriated by the Government, there was a *taking of petitioners' fair opportunity to recoup* the 1941 value of their deposit accounts from the Bank. But for the Government's seizure of the fund, petitioners presumably could have redeemed their deposits with the bank in California after Pearl Harbor at the 1941 rate without suffering the wartime deterioration of the yen.

That was the very point underlined by the Report in 1946 of the House Judiciary Committee upon the new provision enacted as §34 of the statute (H.R. Rep. No. 2398, 79th Cong., 2d Sess., p. 10, emphasis supplied): "The Custodian has emphasized to the committee that he is anxious to satisfy the proper claims of creditors and the committee concur in the view that there exists a strong moral obligation to satisfy them inasmuch as, *but for the vesting of their debtors' property, they would presumably have been able to pursue ordinary remedies against the debtors.*" This express legislative history clearly invokes the presumption this Court has indulged (see, e.g., *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 737) that

Congress intended just compensation not only to the immediate owner of property appropriated by the Government, but equally "to those deprived" of secondary benefits in or of legal rights upon the property taken. Indeed, this Court held in *International Paper Company* v. *United States*, 282 U.S. 399, 407, that a taking of the total output of an electric power company for war-time use required just compensation also to a private lessee of the company, whose partial leasehold interest was thereby effectively invaded, stating that "There is no room for quibbling distinctions between the taking of power and the taking of water rights." The distinction between the taking of a bank's deposit account funds and the taking of the depositors' accounts is, we submit, equally quibbling. It is thus clear that, within the meaning of the Fifth Amendment, the Government has taken petitioners' property and property rights. See also *Armstrong* v. *United States*, 364 U.S. 40, 44, where liens on property taken by the Government were held to be "compensable property interests within the meaning of the Fifth Amendment."

But even in the remote event of a contrary construction, a due process issue would still arise if after the Government's summary seizure of a private bank's assets fair opportunity were denied for recoupment by its depositors. In the much more tenuous context presented in *Greene* v. *McElroy*, 360 U.S. 474, this Court re-emphasized the applicability of the due process clause to Governmental interference with private relationships. There the revocation of the Defense Department's security clearance had seriously affected Mr. Greene's ability to obtain private employment. This Court recognized (at 493, n. 22) the applicability in those circumstances of due process norms, noting that the Government's actions had:

> "... caused substantial injuries, *Joint Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 152, (concurring opinion), and, were they the subject of a suit between private persons, they could be attacked as an invasion of a legally protected right to be free from arbitrary interference with private contractual relationships. Moreover, petitioner has the right to be free from unauthorized actions of government officials which substantially impair his property interests. Cf. *Philadelphia Co.* v. *Stimson*, 233 U.S. 605."

This Court's emphasis in *Greene* on the freedom from Government actions "which substantially impair" private property interests is doubly applicable in this case. The suggestion that the Federal Government can seize enemy funds and then, by interposing sovereign immunity, bar restitution to loyal citizens having legal claims upon the seized assets, would sanction violation of the constitutional guarantees of substantive and procedural due process. The argument that due process runs only to the "enemy" whose property was appropriated but not to the United States citizens whose deposit-redemption rights were thereby forfeited is too extravagant for serious consideration.

Accordingly, whether measured against the just compensation or the due process guarantee, sovereign immunity fails on fundamental Fifth Amendment grounds as a rationale for barring equitable estoppel or tolling of limitations under the Trading With the Enemy Act. To avoid Fifth Amendment invalidity, this Court should indulge every presumption against an inference of Congressional intent to immunize the Government from tolling or estoppel of the Act's limitation period. As we next show, there is no slightest Congressional implication of such an intent, and, indeed, ample evidence to the contrary.

2. Far From Preserving Sovereign Immunity, Congress Made Such Normal Rules of Civil Litigation As Limitations Tolling Applicable Under the Act.

Judicial power to toll or estop limitations has been upheld under a wide variety of federal enactments and is now recognized as applicable in the absence of evidence that Congress has made a prescribed limitation period wholly inexorable.[6] Most significant in appraisal of the Government's plea for immunity from equitable tolling and estoppel is the absence of a single word in the Trading With the Enemy Act or its history which would support such an exemption. On the contrary, the text and legislative history demonstrate that Congress recognized the operation under the Trading With the Enemy Act of such normal civil rules as equitable tolling and estoppel of limitations.

It is preliminarily to be noted that one of the five "major objectives" of the 1946 legislation (H. R. Rep. 2398, 79th Cong., 2d Sess., p. 1) was to provide for the payment of debt claims "on an equitable basis to the extent that the assets vested from each debtor permit", and that fair distribution of vested assets to non-enemy creditors was thus the underlying purpose of Section 34. Moreover, in providing for judicial review under Section 34 (e) and (f) in debt claim cases by civil suit in the District Court for the District of Columbia, Congress showed its high concern for the rights of the claimants. And the Committee was at pains to emphasize that "no injustice should result" from centralized and regulated review in the District, and pointed out that under the measure the Custodian's fact

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[6] See, e.g., *Burnett* v. *N.Y. Central R. Co.*, 380 U.S. 424 (FELA); *United States* v. *Price-McNemar Construction Co.*, 320 F. 2d 663 (Miller Act); *United States* v. *Woodbury*, 359 F. 2d 370 (False Claims Act); *Northern Metal Co.* v. *United States*, 350 F. 2d 833 (Suits in Admiralty Act); *Westinghouse Electric Corp.* v. *Pacific Gas & Electric Co.*, 326 F. 2d 575 (Clayton Act); *Osbourne* v. *United States*, 164 F. 2d 767 (Jones Act).

determinations were made amenable to full judicial review and even to further evidentiary re-examination (H. R. Rep. 2398, p. 14).

Most significant is the manifested Congressional desire to preserve the rights of claimants with respect to the tolling of limitations. The Act provides that in suits for return of property under Section 33, in computing the two year limitation "there shall be excluded any period during which there was [formerly] pending a suit or claim for return . . .". The House Committee (H. R. Rep. 2398, p. 9) explained this limitations-tolling rule in succinct terms: "*fairness requires that there be excluded any period during which . . . a suit has been pending pursuant to section 9 (a).*" In Section 34 the limitations-tolling principle is once again recognized. The provision of Section 34 (a) concerning the Custodian's right to assert against a debt claim any defense which would have been available to the debtor stipulates that "the period from and after the beginning of the war shall not be included for the purpose of determining the application of any statute of limitations." The Committee explained that this provision was included "*since in a practical sense creditors do not have normal opportunities for collection of their debts during war*" (H.R. Rep. 2398, p. 11).[7]

These provisions, we submit, most directly evidence Congressional recognition that limitations periods may be tolled in appropriate circumstances. With respect to the very class of persons presently before this Court—statutory debt claimants under Section 34—the Committee stated that obligations of suit within statutory limitations

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[7] Limitations suspension is also recognized in § 3β(c) of the Act, governing tax liability, where it is provided that "Statutes of limitations on assessment, collection, refund, or credit of Federal taxes shall be suspended, with respect to any vested property or interest, or the earnings, increment or proceeds thereof, while vested and for six months thereafter . . ."

periods were tolled during the war because "in a practical sense" opportunities for suit had then been impaired. Having so clearly recognized the applicability of limitations tolling, it defies belief that Congress intended to make the 60-day limitation of Section 34(f) unamenable to the accepted judicial power of equitable suspension.

But even if Congress had not so clearly accepted limitations tolling, there would be no occasion for implying in the statute an exemption from the equitable estoppel principle generally applicable under federal enactments. Once sovereign immunity has been waived, courts have been reluctant to narrow that waiver by reading into the statute, by virtue of sovereign immunity, restrictions and limitations beyond those Congress has explicitly required. That sovereign immunity from equitable tolling and estoppel was preserved by the Congress by mere inference and implication is repelled by the fact that Congress nowhere expressed any concern to preserve sovereign immunity, and that by enacting Section 34(f) Congress itself waived any immunity from suit which might otherwise have existed. Congress having done this, sovereign immunity cannot make a comeback by courts reading into the statute special Governmental exemptions from usual judicial powers. Cf. *United States* v. *Aetna Surety Co.*, 338 U.S. 366, 383.

In *Indian Towing Co.* v. *United States*, 350 U.S. 61; *Rayonier* v. *United States*, 352 U.S. 315; and *United States* v. *Muniz*, 374 U.S. 150, this Court ruled on Government arguments for implied exemptions in the Federal Tort Claims Act flowing from sovereign immunity. The exemptions were refused, and in its *Muniz* opinion (at p. 165) this Court explained that result in terms applicable to the Government's present argument:

"We should not at the same time that state courts are striving to mitigate the hardships caused by sovereign immunity, narrow the remedies provided by Congress. As we said in *Rayonier* v. *United States, supra* at 320, 'There is no justification for this Court to read exemptions into the Act beyond those provided by Congress . . .' "[8]

Government immunity from suspension of limitations was nowhere reserved by Congress in Section 34(f) of the Trading With the Enemy Act. It cannot now be judicially read into the Act, particularly in view of the constitutional considerations heretofore discussed and of the Congressional emphasis that the limitations-tolling principle was to apply under the statute. But were this Court somehow unpersuaded by the special constitutional and statutory considerations here involved, it is also clear that even in an ordinary "suit-against-the-sovereign" situation, once Congress has permitted suit there is no reason or precedent for granting sovereign immunity from a suspension of limitations when necessary to prevent a fundamental injustice.

3. *Once Congress Has Permitted Suit Against the United States, Neither Reason Nor Precedent Supports Governmental Exemption From Tolling And Estoppel of Limitations.*

In appropriate circumstances courts have tolled and estopped Government pleas of limitations under various federal enactments. See *Northern Metal Co.* v. *United States,*

[8] One commentator has noted with respect to estoppel against the Government that "In the United States the doctrine of sovereign immunity is in current disfavor and offers uneasy support to doctrines that work hardship and injustice." Berger, *Estoppel Against the Government,* 21 U. Chi. L. Rev. 680, 683.

350 F. 2d 833, 839 (C.A. 3, 1965); *Osbourne* v. *United States*, 164 F. 2d 767 (C.A. 2, 1947); *N.V. Philips'* v. *A.E.C.*, 114 App. D.C. 400, 316 F. 2d 401; *Vestal* v. *Commissioner*, 80 App. D.C. 264, 152 F. 2d 132, 136; *McWilliams* v. *United States*, 138 F. Supp. 863 (Ct. Cl., 1956); *Exchange and Savings Bank* v. *United States*, 226 F. Supp. 56 (D. Md., 1964); *Borg-Warner Corp.* v. *United States*, 39-1 U.S.T.C. Par. 9292 (N.D. Del., 1939). The Second Circuit's *Osbourne* decision, *supra*, was recently cited with approval by this Court in *Burnett* v. *N.Y. Central R. Co.*, 380 U.S. 424, 427. The Government has cited no compelling reason or authority to impair these rulings. Rather, for its broad claim of immunity from judicial suspension of limitations, the Government relied below upon the rulings in *Utah Power and Light Co.* v. *United States*, 243 U.S. 389, and *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380. But these are cases of promissory rather than equitable estoppel, where an unauthorized representation by an agent of the Government was claimed by plaintiffs to have created a financial obligation of the United States. As the Government put it in its brief below, these rulings establish that the United States is not estopped by the acts of its agents who "without authority, enter into agreements to do what the law does not sanction or permit." But that proposition is inapplicable in the present case, for estoppel has frequently been invoked against the Government where, as here, its agents have made representations within rather than beyond their authority.[9]

Nor is there an effort here to create an obligation of the United States by estoppel and without Congressional sanction. The Government has long ago recognized petitioners as legitimate statutory debt claimants entitled to recoup their 1941 savings deposits from available vested assets.

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[9] See cases collected in Berger, op. cit., *supra*, note 8, at 687, n. 48.

Far from any *enlargement* of the Government's liability, the question is whether an existing statutory obligation to pay valid debt claims may be narrowed and *destroyed* by OAP representations and conduct which induced petitioners to await the outcome of the *Aratani* and *Abe* test suits. Thus, an evenhanded application of the underlying norm in *Utah Power* and in *Merrill* would indicate that if the representations of Government agents in those cases could not create substantive liability, so here such representations cannot be permitted to destroy liability through a subsequent inequitable Government plea of limitations.

Moreover, this Court in *Stearns Co.* v. *United States*, 291 U.S. 54, 59-61 (see also *United States* v. *Woodbury*, 359 F. 2d 370) has estopped a plea of limitations on behalf of the Government against a delinquent taxpayer. We cannot believe that in civil litigation the Government can be exempt from rules it invokes against others, and which are generally available between private litigants. *Cf. supra*, p. 25, n. 7. The Government has cited no precedent for judicial application of special rules of civil litigation once the Government has been made amenable to suit. Cr. *National City Bank of N.Y.* v. *Republic of China*, 348 U.S. 356. Indeed, exempting the Government alone from equitable estoppel and tolling available against other defendants would contravene this Court's repeated view that government is held to the *highest* rather than to diminished standards of fairness in the adjudicative process. See, e.g., *Communist Party* v. *S.A.C.B.*, 351 U.S. 115; *Wong Yang Sung* v. *McGrath*, 339 U.S. 33; *Speiser* v. *Randall*, 357 U.S. 513; *Brady* v. *Maryland*, 373 U.S. 83.

Far from any special Government exemption from limitations suspension, the correct rule would appear to be that recently applied by the Third Circuit in *Northern Metal Co.* v. *United States*, 350 F. 2d 833, 839, where an action under the Suits in Admiralty Act against the Federal

Government for money due was entertained even though filed after the statutory limitation period. The plaintiff failed to sue while awaiting the outcome of administrative proceedings and meanwhile the statutory limitation period passed. A tolling was ordered by the Court to avoid a result "harsh and out of harmony with the purpose and intention of Congress" to afford substantive redress. No less harsh is application of limitations to these petitioners who awaited the outcome of the *Aratani* and *Abe* litigation.

Though we believe the general rule unnecessary of decision in this case involving special Fifth Amendment considerations and the specific legislative evidence previously discussed, we submit that the correct rule is reflected in *Northern Metal* and like decisions: when the Government becomes a defendant following Congressional authorization of suit against it, the statutory limitations period is amenable to equitable tolling and estoppel in appropriate circumstances. We demonstrate in the next point that appropriate circumstances are indeed presented for deeming this suit to have been timely filed.

II

In the Circumstances of this Case Tolling or Estoppel of Limitations Is Required to Prevent Manifest Injustice and Afford to Eligible Claimants the Restitution Congress Commanded.

"Among all the spheres of its activity estoppel probably performs no more useful service than in the alleviation of hardship caused by statutes of limitation." Dawson, *Estoppel and Statutes of Limitation*, 34 Mich. L. Rev. 1. That estoppel of a federal limitations plea is within the power of federal courts is indisputable since this Court's decision in *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231, where a defendant's inducement of the plaintiffs'

delay invoked fundamental equitable grounds for estopping his plea of limitations. And in its still more recent decision in *Burnett* v. *N.Y. Central R. Co.*, 380 U.S. 424, this Court made tolling available under a federal statute where delay in suit had caused no prejudice since defendant was on notice of the plaintiff's claim before expiration of the limitations period.

Burnett provides guiding criteria governing equitable tolling and estoppel of limitations. There, after reviewing the underlying purpose of limitations, the Court concluded that the "policy of repose, designed to protect defendants, is frequently outweighed . . . where the interests of justice require vindication of the plaintiff's rights," and the Court cited a variety of circumstances under which estoppel or tolling is called for by the "interests of justice".[10] The *Burnett* opinion declines to define any technical standard for tolling and instead prescribes (at p. 427) that "the basic inquiry is whether Congressional purpose is effectuated by tolling the statute of limitations in given circumstances". Like other traditional equity rules—and particularly the "flexible instrument" of equitable estoppel—fundamental considerations of justice provide the guiding norm to be applied in each case as it presents its individu-

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[10] "Thus, this Court has held that an FELA action is not barred, though brought more than three years after the cause of action accrued, where a defendant misled the plaintiff into believing that he had more than three years in which to bring the action. *Glus* v. *Brooklyn Eastern Terminal, supra.* Moreover, it has been held that the FELA limitation provision is tolled when war has prevented a plaintiff from bringing his suit, even though a defendant in such a case might not know of the plaintiff's disability and might believe that the statute of limitations renders him immune from suit. See *Osbourne* v. *United States,* supra; *Frabutt* v. *New York, C. & St.L.R. Co.*, supra. In such cases a plaintiff has not slept on his rights but, rather, has been prevented from asserting them.

"Considerations in favor of tolling the federal statute of limitations in this case are similar to those leading to an extension of the limitation period in the cases mentioned above" (380 U.S. at 428-29).

alized equities.[11] And it is just such fundamental interests of justice which this Court in *Stearns Co.* v. *United States*, 291 U.S. 54, found controlling in estopping a taxpayer from pleading limitations against the Government. There the taxpayer's own request for further administrative action had induced the Government to delay its suit; this Court applied estoppel against limitations stating that: "To know whether liability has been barred by limitation it will not do to refer to the flight of time alone . . . It may have been postponed by deliberate persuasion [by the taxpayer] to withhold official action" (291 U.S. at 61).

Applying these guidelines to the case at bar, it is clear that there are here presented the strongest considerations calling for equitable suspension of the Act's normal 60-day limitation. Here (1) petitioners relied on the Government's initial offer of restitution at the 2% post-war conversion ratio and seek recovery based on its change of position in 1964 after this Court's grant of review in *Aratani*; (2) between 1961 and 1964 petitioners reasonably awaited the outcome of the *Aratani-Abe* litigation, anticipating equal treatment following its resolution, and when equal treatment was refused they filed this suit before expiration of the *Abe* litigation; (3) the Government was from the first implicated in petitioners' "delay" by the 20 years which elapsed before OAP issued its controlling administrative ruling, and by its confusing, burdensome, and discouraging representations and demands upon petitioners; and (4) sheer injustice results if the Government may abuse limitations in the present suit to bar recovery by citizens whose statutory eligibility for restitution has long been conceded.

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[11] The foundation of equitable estoppel "is justice and good conscience. Its object is to prevent the unconscientious and inequitable assertion or enforcement of claims or rights . . . The doctrine of equitable estoppel is pre-eminently the creature of equity." Pomeroy, *Equity Jurisprudence*, § 801 (1941 Edition). See also *Canada and Dominion Sugar Co. Ltd.* v. *Canadian National Steamships, Ltd.* [1947] A.C. 46, 55.

i. *Petitioners Relied On The Government's Initial Offer Of Restitution At The 2% Post-war Conversion Ratio And Seek Recovery Based On Its Change Of Position In 1964 After This Court's Grant Of Review In* Aratani.

During the many years when petitioners awaited the Government's administrative disposition of their claims, the "test case" in the Office of Alien Property was that of Kunio Abe. In 1958, petitioners were informed by letters from the OAP (R. 6, 29) that the *Abe* case was concluded and that under its ruling the Government had decided to pay them only at the post-war rate of exchange (i.e., 2%). They were further informed that the right to litigate the conversion rate question would only arise upon the future publication of the Yokohama Specie Bank schedule. Following the OAP's publication of that schedule in 1961, a class action by Yokohama Bank claimants challenging the use of the post-war conversion ratio was filed under the name of *Abe* v. *Kennedy;* petitioners not unreasonably believed themselves protected by that suit (R. 10, 14, 16, 19). As a strictly technical matter, however, that belief was incorrect in the sense that the *Abe* suit had been filed only for those Yokohama Bank depositors who had sent in their original deposit certificates after receipt of the 1958 OAP letter and were thus listed on the 1961 OAP schedule. But that distinction was lost on these thousands of petitioners, many of whom were elderly and non-literate persons unable to read the English language, unrepresented by counsel, and dependent upon other lay persons for advice.[12]

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[12] The uncontested affidavit of Katsuma Mukaeda (R. 19), President of the Japanese Chamber of Commerce of Southern California, sets forth these facts in the following terms:

> "Many of the Yokohama Specie Bank yen deposit certificate holders were old people who could not read English and could not understand the communications they received from the Office of Alien Property; many of them had to rely upon other persons who themselves were not

After this Court granted certiorari in *Aratani* the Government settled that case, and also settled with the Yokohama Bank claimants in *Abe* at the pre-Pearl Harbor conversion ratio (without interest). Yet, inexplicably, it rejected (R. 46) repeated requests to afford similar treatment to petitioners' deposits in the same bank. Since the Government has on hand adequate vested assets of the Yokohama Bank to afford petitioners the same treatment as their fellow claimants in *Abe*, it is difficult to understand why the Government has declined to do so, nor has it volunteered an explanation at any time in this litigation. Whatever be the reason for the Government's refusal, the relevant fact is that it did first make a 2% offer and representation and then in 1964 it did change its position in its settlement of the *Abe* case after this Court's grant of *certiorari* on the conversion-ratio question. That the fundamental elements necessary for an estoppel were thereby created is the conclusion set forth in the following succinct terms by the dissenting opinion below of Judge J. Skelly Wright (R. 98-99):

> "The 1958 letter unquestionably contained an authorized representation of fact—that it was the Govern-

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able to understand the letters; most of the claimants had never talked to a lawyer about their cases and there was a general feeling in the community that all of the claims were going to be treated alike, both the Sumitomo Bank claimants and the Yokohama Specie Bank claimants; there was knowledge in the community that a law suit had been filed in Washington and it was understood and believed that the outcome of that law suit would determine how much money the claimants received and that it would apply to all claimants not just some . . ."

Mr. Mukaeda's uncontested representation of record that most of the claimants had never spoken to a lawyer about their cases is confirmed by the fact that in 1961 counsel for petitioner Honda (see J.A. 9) only represented some fifty claimants, and by review of a sample of the files submitted for inspection by the Department of Justice which shows that a majority of the numerous petitioners herein were not represented by counsel before the OAP.

ment's position that payment should be made at the post-war rate. This representation was relied upon by appellants when they failed to file their certificates, knowing full well they could get the same rate at any time in Japan. The Government knew reliance might follow, and encouraged such reliance by suggesting Japan as an alternate, speedier source of funds. That only 1,817 of about 7,500 eligible claimants complied with the letter is strong evidence of its effect.

"It turns out, however, that the Government's position changed. When the Supreme Court granted *certiorari* in *Aratani*, the Government settled the cases on a basis completely at variance with its original position. The power of the Government to take its 1958 position, and to change its position in 1963, is incontestible. But the exercise of this power cannot become a means, whether intentional or inadvertent, whereby innocent persons who acted in reliance upon the Government's first representation should be denied the opportunity to recoup moneys which Congress wanted returned. The pattern of events—the letter which discouraged filing of certificates because of the position taken therein, the failure of the vast majority of claimants to file certificates, the subsequent change of position and settlement, the exclusion of appellants from the benefits of the change of position—could hardly have been better designed to secure exclusion of most claimants from the relief Congress afforded them, and from the relief to which the Office of Alien Property now apparently agrees they were always entitled."

Clear as is the case for equitable estoppel urged by Judge Wright, he appears to go one step further and recognize the corollary question whether the statute of limitations

ever commenced to run in 1961 on petitioners' cause of action. Judge Wright emphasizes (R. 99) "the exclusion of appellants from the benefits of the change of position" by the Government in 1964. The Government having changed its position in 1964 and having made a new offer at that time, it not only had the power but the *duty* to treat all Yokohama Bank debt claimants in the same fashion. Thus, the Government is not merely estopped to plead the statute of limitations' expiration in 1961 when it was making a niggardly offer the legality of which it has never attempted to defend in this Court; its subsequent 1964 offer to some Yokohama Bank debt claimants imposed on the Government the obligation to make the same offer to all debt claimants—at least to the 4,100 petitioners who in 1958 declined either to send in their original certificates or to withdraw their claims. That being the case, petitioners acquired the right to avail themselves of the new offer *at the time it was made* to the *Abe* claimants. As we next demonstrate, petitioners' suit to vindicate that right was timely brought in 1964 when the equal treatment they had reasonably anticipated was denied them.

ii. *Between 1961 and 1964 Petitioners Reasonably Awaited the Outcome of the* Aratani-Abe *Litigation, Anticipating Equal Treatment Following Its Resolution, And When Equal Treatment Was Refused They Filed This Suit Before Expiration Of The* Abe *Case.*

Petitioners anticipated that if the *Aratani-Abe* litigation established the inadequacy of the Government's 2% return offer, it would give them equal treatment with their fellow claimants. Certainly that was not an unreasonable assumption, and to this day the basis for refusal by the Government

to pay petitioners the same ratio of return it accorded the *Abe* claimants remains completely unexplained.

In measuring the reasonableness of petitioners' anticipation of equal treatment upon conclusion of *Abe*, it must be recalled that their cause rests on the Government's statutory obligation to pay valid debt claims. In that situation no one could fairly be required to anticipate that the United States Government would make arbitrary and invidious distinctions among claimants, returning 100% on seized savings accounts to 1,800 Yokohama Bank depositors, but relegating 4,100 others to a 2% return from the Bank in Japan even though adequate vested funds are on hand here to give them equal restitution. Under these circumstances, and particularly since the vast majority of petitioners had no assistance of counsel (see *supra*, p. 33, n. 12), it becomes appropriate to effect a tolling of limitations for petitioners while the *Abe* case was in litigation.[13]

A tolling similar to that approved by this Court in *Burnett* would clearly render this suit timely. The *Abe* case was filed within the statutory 60-day period and the present suit was filed in the District Court *before* expiration of the *Abe*

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[13] A defendant's fiduciary relationship has been generally recognized as an adequate ground for barring his plea of limitations. See Annotation, 24 ALR 2d at 1446-1448. The Government as custodian of vested alien property was charged by the Congress under Section 34 of the Act with the obligation to make prescribed disbursements to eligible debt claimants to the extent permitted by available vested assets—a fiduciary obligation. Indeed, a close analogy can be made to the fiduciary relationship of a trustee in bankruptcy in similar circumstances. Let us hypothesize a case of a trustee purporting to make a final distribution. Some creditors later bring suit to force the trustee to collect other assets from the bankrupt and they are successfully collected by the trustee. Certainly *all* creditors would have a right to share equally in the additional assets. So here, once the Government agreed to pay full value to some debt-claimants, it had the obligation to pay the others equally from the admittedly available fund. The default on that Government fiduciary duty having occurred in 1964, it is clear that the statute of limitations did not commence until then and petitioners' action is timely.

litigation. On March 18, 1964 the District Court tentatively approved a settlement in *Abe* acceptable to the Government and the named claimants (228 F. Supp. 706), but the Court expressly limited its approval to an "interlocutory order" subject to protest by any member of the *Abe* class (228 F. Supp. 706 at 710). Subsequently, on May 18, 1964, the District Court entered its formal order approving the *Abe* settlement (*infra*, Appendix, p. 48), which became final 60 days later upon expiration of the time for appeal (see Rule 73(a), F.R.C.P.). Meanwhile, the Department of Justice having refused the benefit of the *Abe* settlement to the present petitioners, this suit had been filed in the District Court on May 19, 1964, one day after entry of the settlement order in *Abe* and well before the appeal time expired.

Just as in *Burnett*, there was no unreasonable delay by petitioners. Just as in *Burnett*, too, a tolling of limitations is appropriate, no prejudice having resulted once the *Abe* case put the Government on notice to defend and this action having been filed before *Abe* was concluded. Since the funds are adequate to pay petitioners on the same basis as the *Abe* claimants, and since the filing of a suit in 1961 would have had no practical effect of any discernible kind, no policy of limitations can possibly prevent, and justice requires, a tolling of limitations during the pendency of the *Abe* litigation.[14]

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[14] Where a statute of limitations has been tolled by a timely action dismissed for wrong venue or other procedural reasons, additional plaintiffs and even different plaintiffs representing the same interest have been permitted to prosecute the second action commenced after the limitation period expired. See Annotation, 3 ALR 824, 825-826. No different rule should apply where the first action has prevailed on the merits than where it has failed for procedural defects. The suit which has prevailed should be deemed to toll limitations sufficiently to permit persons similarly situated to prosecute the same cause of action against the same defendant prior to the expiration of the first action.

iii. *The Government Was From The First Implicated In Petitioners' "Delay" By The 20 Years Which Elapsed Before OAP Issued Its Controlling Administrative Ruling, And By Its Confusing, Burdensome And Discouraging Representations And Demands Upon Petitioners.*

This Court's decision in *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231, held that equitable estoppel of limitations is particularly appropriate where a defendant has been implicated by his own conduct in plaintiff's failure to file suit within the statutory period. We do not urge that in the present case the Government acted willfully to deceive petitioners. But certainly its entire course of conduct with respect to petitioners could not have been better calculated to lull them into inaction through delay, discouragement, confusion, fear, and disgust. Since the ultimate aim of estoppel against limitations is to prevent unjust defeat of legal rights, it is available "even though the inducement to delay was done innocently or unintentionally" by the defendant (*Peters* v. *St. Paul Fire & Insurance Co.*, 213 F. Supp. 441, 442 (S.D.N.Y., 1963) and without the necessity of any misrepresentation by defendant. Thus, in *Stearns Co.* v. *United States*, 291 U.S. 54, 59-61, the Government was afforded estoppel against limitations though the defending taxpayer had made no misrepresentation; in *United States* v. *Woodbury*, 359 F. 2d 370, 375 (C.A. 9, 1966) the United States as claimant was recently granted a tolling of limitations under the False Claims Act where no prejudice had arisen from its choice of the wrong forum of litigation, the limitation period meanwhile having expired; and in *Northern Metal Co.* v. *United States*, 350 F. 2d 833 (C.A. 3, 1965) limitations was recently tolled against the Federal Government in the absence of any misrepresentation, during the pendency of administrative proceedings.

The Government conduct which sparked the entire se-

quence of presently relevant events was the 1958 letter from the OAP to the 7,500 Yokohama Bank claimants offering them a mere 2% return and demanding immediate surrender of their original deposit certificates. That unexplained demand was particularly arbitrary when it is recalled that some ten years earlier the claimants had filed certified claims (usually by photostatic copy of the deposit certificate), that no question about the authenticity of the claims was being raised, and that to this day the OAP's need for original certificates in 1958 remains obscure. Moreover, the 1958 letter to the claimants was unnecessarily confusing on the question whether the original certificates were being demanded also from those who rejected a 2% return, since it stated that "if you submit your original certificates of deposit to this Office, I can recommend your claim for allowance in the sum of" 2% of 1941 value. Whatever may have been intended, the failure to explain the Government's need for the original deposit certificates coupled with the confusing communication with respect to their submission, led to the natural inference that a surrender of the original deposit certificate might constitute acquiescence in the 2% return offer.

Indeed, by its enclosure of a claim cancellation card to each claimant, the Government's 1958 letter also exhibited most clearly its zeal not to protect the rights of the claimants but simply to reduce the number of pending claims. Certainly, at a time when the Department of Justice had just reversed its own Examiner's ruling that the 1941 conversion ratio *should* apply and before any judicial test on the conversion ratio issue had been or could have been filed, the Government's *sua sponte* suggestion that the claimants should withdraw their claims and simply cash their certificates in Japan for 2% was both highly improper and prejudicial. The claimants were thereby effectively caught between the Scylla of accepting the Government's sugges-

tion of a 2% return in Japan (and cancellation of their debt claims) and the Charybdis of possibly acquiescing in the 2% offer by sending in original certificates demanded by the Government's return offer. Thus the Government is deeply implicated in the failure by the majority of the recipients of the OAP's 1958 letter to take either course—particularly because *both* courses of affirmative action suggested by the Government constituted improper, arbitrary, and officious instructions tending to cause the surrender rather than enjoyment of the claimants' statutory rights.

Some 1,600 of the 7,500 recipients of the "Notice of Cancellation of Claim" card signed and returned it to the OAP upon reading in the letter that "under the circumstances you may wish to utilize the funds in Japan rather than await settlement by this Office." Some 1,800 others sent in their original deposit certificates. A majority—the 4,100 petitioners in this suit—having already waited 17 years for return of their savings accounts, took neither course and simply continued to await further developments. Those further developments were the filing of the *Abe* suit in 1961, its settlement in 1964 granting each litigant the full 1941 value of his savings deposit, and the Government's 1964 refusal to accord petitioners the same treatment as these other Yokohama Bank claimants.

In measuring the appropriateness of an estoppel here against the plea of limitations, where the Government itself has been implicated in the plaintiffs "delay", it is material that twenty years of delay through no fault of petitioners occurred between the seizure of their assets and the publication of the OAP schedule in 1961 which the Government asserts commenced the running of the 60-day limitation period. It is equally material that petitioners were at best confused by the Government's prolix instructions in 1958 and many actually feared to surrender their last evidence of indebtedness and possibly their right of full return by

mailing in their original deposit certificates in response to the 2% payment offer. And it is relevant that the Government in the very letter offering that piddling restitution and demanding surrender of the original deposit certificates, counseled the abandonment of statutory claims by the claimants' acceptance of 2% in Japan. It is hardly surprising that most of the claimants failed to send in their original certificates in response to the Government's insulting and erroneous suggestion, 17 years after seizure of their rights, that they could have no more than and should settle for 2% restitution. *What is surprising is that the Government, which delayed 20 years before it finally made its indefensible and undefended 2% offer, should even ask this Court to bar petitioners' admittedly valid claims because of their more than 60-day delay in suit while* the Aratani-Abe *litigation was pending.*[15]

It is inconceivable that the Congress which in 1946 enacted provisions to assure a fair disbursement of vested assets to non-enemy debt claimants would have sanctioned such small regard by the OAP for the interests of thousands of claim-

---

[15] The Congress which in 1946 enacted the 60-day limitation period would have been surprised indeed by the proposition that the OAP would take 15 more years before issuing its administrative determination concerning petitioners' claims and then hew inexorably to the 60-day bar. The Committee report (H.R. Rep. 2398, 79th Cong., 2d Sess., p. 12) noted but rejected a recommendation that it set a time limit upon the OAP's administrative determinations, stating that the Custodian *"has strongly affirmed his desire and intention . . . to proceed with all possible dispatch, and the claimant's day in court will follow by way of review of his determinations . . ."*. In the face of this Congressional insistence on expedition, the Government continues to urge that it could delay for 15 years after the 1946 enactment before issuing its ruling to petitioners, and then inexorably bar their "day in court" on the 61st day following that administrative action. Precedent, as well as justice, preclude such a result. Thus, in a case where the Atomic Energy Commission delayed for years in carrying out its Congressional duty, the Government was estopped from applying the usual limitations period to bar a suit by plaintiffs who had been affected by the Government's own delay. *N. V. Philips'* v. *A.E.C.*, 114 App. D.C. 400, 316 F. 2d 401.

ants as has been shown to these citizens. Every Congressional purpose, we submit, is served by precluding the Government from now asserting the 60-day limitation as a wholly technical bar to petitioners' statutory right to payment. Particularly is this so, as we next show, in view of the fact that the Government has conceded and does not now deny the legitimacy of petitioners' statutory claims and would thus invoke limitations simply to preclude the very disbursement from vested assets which Congress long ago made mandatory.

iv. *Sheer Injustice Results If the Government May Abuse Limitations In the Present Suit To Bar Recovery By Citizens Whose Statutory Eligibility For Restitution Has Long Been Conceded.*

In this case the most elementary consideration of justice calls for judicial suspension of limitations: there has *never been any question* about petitioners' statutory eligibility for an alien property return, which the Government expressly recognized as long back as 1958 (see R. 29-30); thus application of the 60-day bar in this case serves no limitations purpose of protecting a party from having to "defend" against stale claims but simply divests citizens of their conceded statutory rights.

This compelling consideration once more invokes this Court's emphasis in *Burnett* that the purpose of limitations may be outweighed "where the interests of justice require vindication of the plaintiff's rights" and that "the basic inquiry is whether Congressional purpose is effectuated by tolling the statute of limitations in given circumstances". Indeed, this Court's conclusion in *Burnett* (at p. 434) that "The humanitarian purpose of the FELA makes clear that Congress would not wish a plaintiff deprived of his rights when no policy underlying a statute of limitations is served

in doing so", appears even more applicable to the humanitarian purpose reflected in Section 34 of the Trading With the Enemy Act. Every interest of justice is advanced and the central Congressional purpose is served if this suit is deemed to have been timely filed. No clearer interest of justice could call for suspension of limitations than a defendant's concession that the plaintiff's legal claim is meritorious, particularly where the claim rests on the Congressional requirement that valid debt obligations be paid to the extent that vested assets are available for that purpose. Certainly, too, "Congressional purpose is effectuated" by tolling the statute to afford these petitioners the same return granted the *Abe* litigants from the vested assets of the Yokohama Specie Bank remaining in the possession of the Government.

Pertinent also under these circumstances is the landmark ruling of this Court which prompted enactment of the 1946 provisions of the Trading With the Enemy Act. In *Markham* v. *Cabell*, 326 U.S. 404, 409, this Court rejected the Alien Property Custodian's literalistic argument that the Act's limitations period had expired many years before the Second World War. Said the Court of the Government's argument:

> "... the remedy afforded by § 9(a) would be quite illusory and ineffective so far as it applies to World War II claims if § 9(e) were read literally without regard to its history. It was for this reason particularly that the court below refused 'to make a fortress out of the dictionary' and to read § 9(e) strictly and literally. The policy as well as the letter of the law is a guide to decision. Resort to the policy of a law may be had to ameliorate its seeming harshness or to qualify its apparent absolutes as *Holy Trinity Church* v. *United*

States, 143 U.S. 457 illustrates. The process of interpretation also misses its high function if a strict reading of a law results in the emasculation or deletion of a provision which a less literal reading would preserve.'

* * * * * * *

We have urged herein four salient considerations each of which would suffice to invoke an estoppel or tolling on behalf of petitioners, whose delay in suit was at most an immaterial technical default. But, when all four considerations are taken together, an overwhelming case for tolling and estoppel is made out. And if all this were still not enough, there remains the driving force of the underlying constitutional concern created by summary Government seizure of private property. As this Court emphasized in *Societe Internationale* v. *Rogers*, *supra*, p. 19, courts must exercise special care to safeguard plaintiff-claimants' procedural rights under this statute; plaintiff-claimants are in effect defendants and it is only the subsequent fair opportunity of judicial review by which the original Governmental seizure is "rescued from constitutional invalidity". The necessity of rescuing the constitutional validity of the Government's seizure requires every possible construction of Congressional intent to permit a tolling or estoppel to prevent a fundamentally unjust divestiture of petitioners' rights. *Cf. Russian Volunteer Fleet* v. *United States*, 282 U.S. 481, 492.

When all these considerations are put together, petitioners cannot possibly be barred from recovery because of their failure to institute a separate suit between 1961 and 1964 while *Aratani* and *Abe* were pending in federal litigation. In *Guessefeldt* v. *McGrath*, 342 U.S. 308, 319-320, this Court construed the Trading With the Enemy Act in a non-

technical manner which served to avoid unfairness—indeed even constitutional doubts—arising from a contrary reading; it did so by a "cumulative effect" approach even more appropriate in the present case:

> "The concern of the Trading with the Enemy Act is with problems at once complicated and far-reaching in their repercussions. Instead of a carefully matured enactment, the legislation was a makeshift patchwork. Such legislation strongly counsels against literalness of application. It favors a wise latitude of construction in enforcing its purposes . . . None of the considerations we have canvassed standing alone is conclusive in favor of the claimant. Perhaps none, by itself, would justify a decision in his favor. The cumulative effect, however, places such a decision well within the bounds of reasonable construction."

Conclusion

In *Glus* and *Burnett* this Court announced principles calling for judicial sensitivity in applying equitable tolling or estoppel of limitations to avoid grave injustice. There are, of course, bounds beyond which courts cannot go in suspending limitations even for deserving plaintiffs. But whatever may be the outside limits of the power of suspension, this is a case falling well within the perimeter of those limits. Beyond all the other considerations tending in that direction which we have briefed herein, there remains the additional consideration that petitioners are loyal Americans who have suffered enough. The thousands of blameless citizens unjustly divested by the ruling below of their property and their statutory rights are the same class of persons who have suffered so much in the past from the Government which now inexplicably resists the return of their savings deposits in the Yokohama Specie Bank.

It is respectfully submitted that the ruling below should be reversed.

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APPENDIX

Filed May 18, 1964. Harry M. Hull, Clerk

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3164-58

GEORGE T. [illegible]ATANI, et al., *Plaintiffs*,

v.

ROBERT F. KENNEDY, Attorney General of the United States, *Defendant*.

Civil Action No. 3228-58

KYUICHI SUMIYOSHI, et al., *Plaintiffs*,

v.

ROBERT F. KENNEDY, Attorney General of the United States, *Defendant*.

Civil Action No. 1176-59

KINZUCHI SHIGENO, et al., *Plaintiffs*,

v.

ROBERT F. KENNEDY, Attorney General of the United States, *Defendant*.

Civil Action No. 2529-61

KUNIO ABE, et al., *Plaintiffs*,

v.

ROBERT F. KENNEDY, Attorney General of the United States, *Defendant*.

MEMORANDUM AND FINAL ORDER

The above causes came before this Court for hearing on March 9, 1964, on the joint motions of plaintiffs and defendant for approval of a compromise of a class action pursuant to Rule 23(c) of the Federal Rules of Civil Pro-

cedure and for allowance of counsel fees. Subsequently, on March 17, 1964, an Interlocutory Order approving the compromise and awarding the counsel fees was signed. This order directed counsel for plaintiffs to give written notice of the proposed compromise and the proposed counsel fees to all 2,963 claimants. The order further provided that a final hearing on these matters would be held on April 27, 1964, and that any interested party could object to the proposed settlement and fees, either in writing or by appearing in person or by counsel.

The compromise agreement was arrived at by counsel for the Office of Alien Property and counsel for the claimants. The parties then came before this Court and petitioned for approval in accordance with the Federal Rules of Civil Procedure. Counsel did not participate in any of the compromise negotiations before the Court, the tentative agreement having been achieved before the Supreme Court entered its Order, dated March 2, 1964, referring the causes to this Court for the approval of a compromise settlement.

Subsequent to the filing of the petition and prior to the issuance of the Interlocutory Order on March 17, 1964, this Court was satisfied that the proposed agreement was in the best interests of all the parties. However, the Court went beyond the mandatory requirements of Rule 23(c) and required notice by mail to all of the claimants.

Counsel for plaintiffs mailed copies of the Interlocutory Order, along with an explanatory letter, to each of the 2,963 claimants on March 18, 1964. The letter and the order each explained that the claimants should communicate written objections to the Court prior to April 27, 1964.

The Court received three letters setting out objections to the award of counsel fees. Two of these stated that the twenty per cent award was excessive. The claims of these two parties amount to a total settlement of $5,010.36. The third letter stated that the original agreement was for a fee of 10 per cent; this claimant will receive a settlement of $2,425.00.

These objections must be considered in the light of the 2,960 other claims and the total amount of $6,395,357.56. It should also be noted that the three claimants who now

oppose the award of counsel fees would have received a total of $169.15 on the original schedule from the Office of Alien Property. Under the agreed settlement they will receive a total of $7,435.56, due primarily to the efforts by their counsel.

The Court received only one objection to the settlement, and this was from a claimant whose claim was previously disallowed by the Office of Alien Property. In addition, the Court received ten other written inquiries concerning other claims, which had been previously disallowed, changes of address, and other questions relating to the claims.

Affidavits filed by counsel for plaintiffs state that notices have been mailed to all claimants. Counsel further stated for the record that two hundred and fifty-five (255) notices from the first mailing were returned by the post office for various reasons. New addresses have been obtained for many of these claimants and counsel for both parties are continuing in their efforts to contact all claimants.

In addition to the notice by mail, counsel have also obtained publication in at least seven newspapers, in either English or Japanese, in the locales in which a majority of the claimants reside. . . .

ORDER

Accordingly, it is this 18th day of May, 1964,

ORDERED, that the Interlocutory Order of March 17, 1964, be, and the same hereby is, made final, except that the word "pending" is hereby stricken from the last line of page 3 and at the end of the first paragraph of page 4 of the Interlocutory Order; and the Office of Alien Property is directed to proceed with the payments to the respective claimants in accordance with the compromise agreement . . .

IT IS FURTHER ORDERED, that Defendant, following final payment to the class plaintiffs and to counsel, pursuant to the Order of March 17, 1964, and this Order, shall inform the Court to that effect, and present an appropriate order.

LEONARD P. WALSH,
Judge.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 164

AYAKO HONDA, et al.,
Petitioners,

vs.

NICHOLAS deB. KATZENBACH,
Attorney General of the United States,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Brief of the State of California as Amicus Curiae

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Brief of the State of California as Amicus Curiae

INTEREST OF AMICUS CURIAE

These petitioners are of Japanese ancestry and are citizens of the United States by birth or naturalization. The great majority of them are residents of the State of California as well. Consistent with the policy of the State of California to redress as far as possible the regrettable injuries suffered by Japanese-American citizens during World War II, the Attorney General of the State of California deems it appropriate to present this brief *amicus curiae* in support of this petition.

As set forth in our Memorandum Amicus Curiae, presented to this Court on June 1, 1966,[1] that policy is represented both by legislative act and judicial decision over the past twenty-five years. We are convinced that a sound legal and equitable basis lies within the power of this Court to continue that policy. We are satisfied that the briefs filed on behalf of these petitioners disclose to the Court a path to such a solution.

Our concern here goes beyond the petitioners who are California citizens. The people of California have a deep and abiding interest in seeing that justice is provided all citizens of this nation.

However compelling and justifiable the circumstances surrounding the original seizure, they are now long past. A continuing sequence of retributory measures has subsequently been enacted—by Congress, this Court, and the courts and Legislature of the State of California. The underlying ethic of this Republic, founded as it was on sure principles of justice and equity, provides a compelling reason for the speedy resolution of this matter in favor of these petitioners.

ARGUMENT

We will not attempt here to augment the legal arguments so capably presented by petitioners' brief. Rather, we will attempt to illuminate more clearly the factual basis upon which petitioners' claim for relief rests.

Several facts perhaps have become obscured in this lengthy litigation:

1. The deposits claimed do rightfully belong to these petitioners. Each of them filed a timely claim in 1946, the

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1. Memorandum of the State of California as Amicus Curiae filed in support of Petition for Writ of Certiorari in this same matter.

first opportunity provided (R. 2). This is conceded by Respondent.

2. Congress unequivocally expressed a policy to return these deposits in the Trading With the Enemy Act.[2] Furthermore, there is little doubt that the Congress which enacted that humane legislation had no intention of subjecting the claimants to a fifteen or twenty-five year delay.

3. Many, if not the majority, of the 7,500 original claimants were elderly citizens laboring under an English language barrier (R. 10-13).

4. The 1958 letter from the Custodian of the Office of Alien Property was a detailed and highly technical directive presenting a confusing array of alternatives and time limitations. In addition to its complexity, its most discouraging aspect was an unequivocal declaration of policy by a high government official that only 2% of the original deposits would be returned.

5. Over 54% of those persons originally sent letters abandoned their claims at that point, either explicitly or implicitly (R. 74). A reasonable inference is that they were completely discouraged by the offer of return (R. 10-13). Without more, the fact that 4,100 out of 7,500 claimants failed to follow the procedure outlined carries its own inference regarding the effect of the O.A.P. letter.

Respondent places great emphasis upon the provisions of the 1958 letter setting out claimants' remedy following publication of the schedule of claims. That remedy basically was the right to file an action in federal court for review of any alleged errors. This was rather a hollow right when we examine a particular case.

The petitioner in whose name this suit was filed, Ayako Honda, was informed in the 1958 letter that she had the

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2. 50 U.S.C. App. § 34 (a).

right under the administrative decision to a return of $9.09 plus interest. This amount represented approximately 2% of her pre-war deposit. We find it difficult to believe that Mrs. Honda would have chosen (1) to wait several years for a schedule to be printed, and (2) to invest several hundreds and perhaps thousands of dollars in litigation fees to recover at most approximately $450.[3]

This is particularly true since the remedy not only necessitated a substantial expenditure of money and delay, but required reversal of the final adjudication of a high administrative official. This is a decision even attorneys approach with trepidation.

Respondent's argument notwithstanding, the 2% offer did constitute a representation of fact carrying great finality. To an elderly, perhaps illiterate Japanese-American layman, it undoubtedly represented for all intents and purposes the ultimate disposition of his claim.

The most persuasive support for this inference is the alternative offered claimants to recover their 2% in Japan, thereby avoiding a considerable delay. In order to comply with the letter, a claimant choosing to get his money immediately from Japan had to file a Notice of Cancellation of Claim card with the O.A.P. We can imagine no clearer invitation to termination of a claim. When coupled with an offer to return little more than postage costs, the letter certainly encouraged total abandonment. This inference is further supported by the uncontested affidavit of the President of the Japanese Chamber of Commerce of Southern California (R. 18-20).

We are persuaded by the facts set out above that the Government's letter was relied upon by these 4,100 peti-

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3. Other cases present even more persuasive facts, since many of the claims represented only a few cents return. See, e.g., affidavit of Shigeo Kumashiro (R. 13).

tioners as the basis for abandonment of their claims. We feel this was a misleading representation—however unintentional it may have been—when the particular handicaps of these petitioners are considered.

The ultimate settlement reached at the pre-war yen-dollar ratio, of course, was a change of position on the Government's part. Here again, the particular circumstances of these citizens provide persuasive reasons to justify their inaction following the publication of the schedule in 1961. The uncontested representation found in Mr. Mukaeda's affidavit that most of these petitioners had not consulted with an attorney suggests that they were unaware of the need to file an action in 1961. Mr. Mukaeda states that it was general knowledge in the Japanese community that other persons similarly situated had commenced litigation, and that any benefit resulting therefrom would inure to the benefit of all (R. 18-20).

The ultimate issues, therefore, are: (1) whether the humane considerations expressed by Congress in the Trading With the Enemy Act will be effected by tolling the statute of limitations, and (2) whether any prejudice whatsoever will result to Respondent if the equitable principle of tolling is invoked. *Burnett v. New York Central R. Co.*, 380 U.S. 424, 427-28 (1964). On the latter issue, Respondents have made no such contention. To adhere rigidly to the statutory limitations provision would not only be totally inconsistent with well-established principles of equity, but would frustrate the clear intent of Congress.

CONCLUSION

We are persuaded there would be little justice in affirming the lower court's decision. California's concern is not solely with the claimants before this Court. They represent

subsequent generations of Japanese-American citizens as well. Their attitudes toward, and respect for, the institutions of our society of law will be deeply affected by this Court's decision.

We respectfully urge that the lower court ruling be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 164

AYAKO HONDA, ET AL., PETITIONERS

v.

RAMSEY CLARK, ACTING ATTORNEY GENERAL OF THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the court of appeals (R. 69) is reported *sub nom. Kondo* v. *Katzenbach* at 356 F. 2d 351. The district court rendered no opinion.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1966 (R. 100), and a motion for rehearing *en banc* denied on February 24, 1966 (R. 101). The petition for a writ of certiorari was filed on May 23, 1966, and granted on October 24, 1966 (R. 102; 385 U.S. 917). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioners brought suit to review the Attorney General's denial of their debt claims under Section 34 of the Trading with the Enemy Act. The suit was commenced two and one-half years after the applicable statute of limitations had expired. The questions presented are:

1. Whether the court of appeals correctly held that the record did not support petitioners' claim that the government, by its conduct, should be estopped to plead the statute of limitations as a defense.

2. If the court of appeals erred in this regard, whether the government can be estopped to raise a statute of limitation defense in a suit under Section 34 of the Trading with the Enemy Act.

3. Whether petitioners' Fifth Amendment rights were infringed by the government's successful assertion of the statute of limitations defense.

STATUTE INVOLVED

Section 34 of the Trading with the Enemy Act, 50 U.S.C. App. 34, provides in pertinent part:

Section 34(a):

> Any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, shall be equitably applied by the Custodian in accordance with the provisions of this section to the payment of debts owed by the person who owned such

property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian. No debt claim shall be allowed under this section if it was not due and owing at the time of such vesting or transfer * * *.

* * * * *

Section 34(d):

Payment of debt claims shall be made only out of such money included in, or received as net proceeds from the sale, use, or other disposition of, any property or interest owned by the debtor immediately prior to its vesting in or transfer to the Alien Property Custodian, as shall remain after deduction of (1) the amount of the expenses of the Office of Alien Property Custodian * * * paid by the Custodian in respect of such property or interest or proceeds, and (2) such amount, if any, as the Custodian may establish as a cash reserve for the future payment of such expenses and taxes. If the money available hereunder for the payment of debt claims against the debtor is insufficient for the satisfaction of all claims allowed by the Custodian, ratable payments shall be made in accordance with subsection (g) hereof to the extent permitted by the money available and additional payments shall be made whenever the Custodian shall determine that substantial further money has become available, through liquidation of any such property or interest or otherwise. * * *

* * * * *

Section 34(f):

If the aggregate of debt claims filed as prescribed exceeds the money from which, in ac-

cordance with subsection (d) hereof, payment may be made, the Custodian shall prepare, and serve by registered mail on all claimants a schedule of all debt claims allowed and the proposed payment to each claimant. In preparing such schedule, the Custodian shall assign priorities in accordance with the provisions of subsection (g) hereof. Within sixty days after the date of mailing of such schedule, any claimant considering himself aggrieved may file in the United States District Court for the District of Columbia a complaint for review of such schedule, naming the Custodian as defendant. A copy of such complaint shall be served upon the Custodian and on each claimant named in the schedule. * * * The court shall enter judgment affirming or modifying the schedule as prepared by the Custodian and directing payment, if any be found due, pursuant to the schedule as affirmed or modified and to the extent of the money from which, in accordance with subsection (d) hereof, payment may be made. Pending the decision of the court on such complaint for review, and pending final determination of any appeal from such decision, payment may be made only to an extent, if any, consistent with the contentions of all claimants for review.

* * * * *

Section 34(i):

The sole relief and remedy available to any person seeking satisfaction of a debt claim out of any property or interest which shall have been vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to

December 18, 1941), or the proceeds thereof, shall be the relief and remedy provided in this section, and suits for the satisfaction of debt claims shall not be instituted, prosecuted, or further maintained except in conformity with this section * * *.

STATEMENT

A. BACKGROUND

On December 7, 1941, petitioners had money on deposit with the Yokohama Specie Bank, Ltd., a Japanese banking corporation with offices in California. In exchange for the deposits, petitioners had accepted the Yokohama Specie Bank's non-negotiable certificates of deposit. Those certificates—which expressed their value solely in Japanese currency (*yen*)—bore the following legend in Japanese and in English translation:

> This is to certify that the sum of yen [amount] has been submitted to our Head Office, Yokohama, to be placed in Fixed Deposit there in your name at—percent. per annum for — months, maturing —, subject to the conditions on the back hereof.
>
> Both principal and interest are payable, when due, at our aforesaid Head Office, Yokohama, upon surrender of this Certificate, properly endorsed and/or sealed.

On December 7 the United States seized the assets of the Yokohama Specie Bank situated in the United States as enemy property pursuant to the Trading with the Enemy Act, 50 U.S.C. App. 1 *et seq.* The Superintendent of Banks of the State of California

was appointed conservator and instructed to liquidate the seized assets and to pay creditors of the Bank.[1] He declined to honor the Bank's *yen* certificates of deposit for payment in dollars on the ground that these obligations—as they stated on their face—were payable only in *yen* in Japan.

On April 23, 1943, the Alien Property Custodian[2] formally vested in himself the assets of the bank remaining after liquidation but he neither vested, nor otherwise attempted to extinguish, the Yokohama Specie Bank obligations represented by the *yen* certificates of deposit. After the war, those certificates of deposit were recognized as valid and collectible at face value in *yen* from the Liquidator of the Yokohama Specie Bank in Tokyo, Japan, or from that bank's successor, the Bank of Tokyo, Ltd. (R. 7). In the intervening years, the dollar value of the Japanese *yen* had declined greatly. The pre-war exchange rate had been slightly more than four *yen* to the dollar; the post-war rate was 361.55 *yen* to the dollar (R. 2).

B. THE "DEBT CLAIM" PROVISIONS OF THE TRADING WITH THE ENEMY ACT

Following the close of hostilities in the Second World War, Congress added Section 34 to the Trading

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[1] The circumstances of the government's acquisition of the local assets of the Yokohama Specie Bank, Ltd., are detailed in *Paramount Pictures, Inc.* v. *Sparling, et al.*, 93 Cal. App. 2d 768, 209 P. 2d 968, certiorari denied *sub nom. McGrath* v. *Paramount Pictures*, 339 U.S. 953.

[2] By Executive Order No. 9788, October 14, 1946, 11 F.R. 11981, the powers and duties of the Custodian were transferred to the Attorney General.

with the Enemy Act[3] in order "[t]o provide machinery for paying claims of creditors against the former owners of vested properties on an equitable basis to the extent that the assets vested from each debtor permit." S. Rep. No. 1839, 79th Cong., 2d Sess., p. 2. (Claims of this character are called "debt claims" to distinguish them from the claims of persons asserting title to specific items of vested property directly—"title claims").

Section 34(a) forbade the Custodian to pay debt claims not in existence when or immediately before the debtor's property was vested in or transferred to the Custodian, and reserved to the Custodian any defense to payment which would have been available to the debtor. Section 34(b) required all debt claims to be filed with the Custodian within two years of the enactment of Section 34 or the vesting or transfer of the debtor's property to the Custodian, whichever occurred later. Section 34(c) required the Custodian to pass on each claim individually. Section 34(d) limited the payment of debt claims to the net proceeds of the vested property after the deduction of expenses and taxes. Section 34(g) directed that certain types of claims be given priority for payment (*e.g.*, wages and salary claims for less than $600.00, certain claims of the United States, etc.).

Different procedures for the consideration of debt claims by the Custodian were provided depending upon whether the vested assets in his hands were sufficient to pay all the claims filed against them. If the

[3] Act of August 8, 1946, c. 878, § 1, 60 Stat. 925, as amended. 50 U.S.C. App. 34.

former, Section 34(e) governed. It authorized the Custodian to pay each individual claim as he acted upon it. A claimant dissatisfied with the Custodian's decision could then file a complaint for judicial review in the United States District Court for the District of Columbia "[w]ithin sixty days after the date of mailing of the Custodian's determination."

Where the vested assets were not sufficient to cover all of the debt claims filed against them—and it is with such an "insolvency" situation that this case is concerned—the following procedure was prescribed: Section 34(f) required the Custodian to pass first on the validity of all of the debt claims filed before making any payments. Then, after making due allowance for payment in full of claims entitled to priority under Section 34(g), the Custodian was required to "prepare and serve by registered mail on all claimants a schedule of all debt claims allowed and the proposed payment to each claimant." Dissatisfied claimants were authorized to seek judicial review in the United States District Court for the District of Columbia "[w]ithin sixty days after the date of mailing of such schedule." Pending decision of any such suits, the Custodian could not pay any other claim (even one not challenged) if payment might jeopardize the full recovery of the claims in litigation. Congress added in Section 34(i):

> The sole relief and remedy available to any person seeking satisfaction of a debt claim out of any property or interest which shall have been vested in or transferred to the Alien Property Custodian * * * or the proceeds

thereof, shall be the relief and remedy provided in this section, and suits for the satisfaction of debt claims shall not be instituted, prosecuted, or further maintained except in conformity with this section * * *.

C. THE CLAIMS AGAINST THE YOKOHAMA SPECIE BANK

The six named petitioners, together with more than nine thousand others, filed debt claims with the Custodian against the vested assets of the Yokohama Specie Bank alone. Nearly seven thousand of those claims were, like petitioners', based on the bank's *yen* certificates of deposit.[4]

The named petitioners have been represented by counsel of their own selection in this matter since 1955 (see App., *infra*, pp. 41–42).

Because the aggregate value of the thousands of debt claims filed exceeded the total vested assets of the Yokohama Specie Bank available to pay them, the Custodian proceeded to process those claims under Section 34(f). With regard to the *yen* certificates of deposit, a principal question to be resolved was whether claims based on those certificates should be paid at the pre-war or post-war *yen*-dollar exchange rate. After extensive hearings (which also concerned thousands of similar debt claims against the vested assets of the Sumitomo Bank), the Attorney General (see p. 6, n. 2, *supra*) in 1957 took the position adopted

[4] Petitioner Ayako Honda claimed 3,289 *yen*, Kanekicki Murakami 6,520 (R. 25), Kaneyo Sato 3,138, Tomi Tsugi 655.14, Gensuki Yoshida 5,000—all plus interest from date of deposit. With respect to the special situation of the sixth petitioner, Mrs. Masae Kondo, see p. 16, n. 11, *infra*.

by the banks in Japan and the California Superintendent of Banks—that the certificates of deposit represented obligations payable in *yen* in Japan. As obligations payable in a foreign currency in a foreign country, the "Judgment Day" rule laid down by this Court is *Deutsche Bank* v. *Humphrey*, 272 U.S. 517, and *Zimmermann* v. *Sutherland*, 274 U.S. 253, would be applicable to determine their dollar value. Accordingly, the Attorney General converted the *yen* obligations into dollars at the rate of exchange prevailing on the date of the administrative allowance of the claim. See *Reissner* v. *Rogers*, 276 F. 2d 506, 511 (C.A.D.C.), certiorari denied, 364 U.S. 816. Thus, he concluded, all *yen* deposit claims should be paid at the post-war exchange rate of 361.55 *yen* to the dollar.

In 1958 and 1959, the Attorney General sent letters to all claimants notifying them of his ruling and the reasons therefor, and specifying the amount of each claim he proposed to allow.[5] To facilitate preparation of the final "schedule" of payments required by Section 34(f), the letters included a request that the claimant submit his original certificate of deposit. In the event those certificates were unavailable, a notarized explanation that they had not been paid would suffice. If the certificates or statements were not submitted within the period prescribed in the letter, the claimant was further advised that, under the general rules governing alien property claims, his claim

[5] The complete text of that notice, which was received by petitioners and by their counsel as well (R. 9, 32), is set forth at R. 6 and 29. The delay in sending the notice reflects the fact that there were more than 43,000 debt claims to process. Ann. Rep. of Atty. Gen., 1953, p. 164.

would be considered abandoned and therefore dismissed.[6]

The letter further advised that payment of *yen* deposit claims was also available in Japan at the same exchange rate allowed by the Attorney General. Any claimant desiring to use that source for immediate payment was requested to withdraw the claim he had filed with the Custodian by returning to him an enclosed "Notice of Cancellation of Claim" card. Finally, the letter specifically informed each claimant of his right to file with the Custodian "your objections to the allowance of the claim in the amount stated" and his additional right to judicial review of that determination under Section 34 of the Trading with the Enemy Act, stating (R. 7):

> Within sixty days after the issuance of the [final] schedule, any aggrieved claimant may file in the District Court of the United States for the District of Columbia a complaint for review of such schedule, naming the Attorney General as defendant.

All the named petitioners and their counsel received this letter (R. 7, 9). Petitioners Honda, Murakami and Tsugi, although represented by counsel, submitted neither certificates of deposit nor nota-

[6] Those rules (promulgated under Section 35 of the Trading with the Enemy Act, 50 U.S.C. App. 35) provided: "A claim shall be deemed abandoned when after request to do so the claimant has not furnished relevant information in support of his claim, or where by virtue of his failure to respond to inquiries regarding the claim it appears that he does not wish to pursue it further." 8 C.F.R. § 502.25(g) (Jan. 1, 1957, Rev.), 21 F.R. 1582. The rule remains unchanged. See 8 C.F.R. § 502.25(g) (1966 Rev.).

rized statements in lieu of those certificates. Nor did they file any objections to the Attorney General's ruling on their claims, as his letter invited them to do. He, therefore, notified these three petitioners (no later than September 1959) that he was dismissing their claims as abandoned, reminding them once again, however, that "further proceedings are governed by section 34(f) of the Trading With the Enemy Act" (R. 33). Copies of this letter were sent to petitioners' counsel (App., *infra*, p. 43).

Petitioners Gensuke Yoshida and Kaneyo Sato (also represented by counsel (p. 9, *supra*)), responded to the letters by signing and mailing back to the Office of Alien Property the "Notice of Cancellation of Claim" cards which had been enclosed with the Custodian's letter, thereby withdrawing their claims (App., *infra*, pp. 44–45). Mr. Sato's withdrawal card was mailed to the Attorney General the same day as the Attorney General's letter notifying him and his counsel that his debt claim had been dismissed as abandoned and that further proceedings would be governed by Section 34(f).

In May 1961 the Attorney General prepared the final "schedule" of all debt claims allowed against the assets of the Yokohama Specie Bank, Ltd., and his proposed payments to each claimant. As required by Section 34(f) of the Act, copies of that schedule were sent (between August 22, 1961, and October 19, 1961) by registered mail to all claimants who had not withdrawn their claims (R. 35). Accompanying each copy was a letter advising the recipient (R. 34): "If your claim is not shown on the Schedule, it is for the

reason that the claim had been dismissed and disallowed by this Office." Petitioners' names were not on the schedule. In that letter the Attorney General again called the claimants' attention to their right to have the Attorney General's decision reviewed judicially:

> This Schedule is being served by registered mail on claimants listed therein, as well as on claimants whose claims have been dismissed and disallowed. Pursuant to Section 34(f) of the Trading with the Enemy Act, as amended, any claimant considering himself aggrieved by this Final Schedule may, within sixty (60) days from the date of the mailing of the Schedule, file in the United States District Court for the District of Columbia a complaint for review of this Schedule, naming the Attorney General as defendant. * * * [R. 34.]

However, none of the petitioners filed suit within the time limit fixed by the Act and described in the letters.

D. THE *ABE* AND *ARATANI* LITIGATION

Other claimants did bring suit to challenge the Attorney General's decision on their debt claims. A timely complaint was filed under Section 34(f) on behalf of the more than eighteen hundred Yokohama Specie Bank claimants who had submitted their certificates of deposit to the Custodian and whose claims were allowed on the final schedule at only the postwar *yen* rate of exchange. *Abe* v. *Kennedy* (C.A. No. 2529-61, D.D.C.).[7]

[7] Petitioners in the present case, it is conceded, "were not included among the class on whose behalf said suit was filed" (R. 3).

The *Abe* complaint asserted that the claims should have been allowed by the Custodian at the pre-war *yen* exchange rate. Proceedings in *Abe* were held in abeyance to await the outcome of *Aratani* v. *Kennedy* (C.A. No. 3164–58, D.D.C.), which presented the identical issue.[8] On July 7, 1961, the district court rendered judgment in favor of the Attorney General in *Aratani*. The court of appeals affirmed. 317 F. 2d 161 (C.A.D.C.). On October 21, 1963, this Court granted certiorari. 375 U.S. 877. While the case was pending in this Court, the plaintiffs in both *Abe* and *Aratani* entered into a compromise settlement with the government. The settlement was approved by the district court on March 18, 1964 (228 F. Supp. 706), and the writ of certiorari was then dismissed (380 U.S. 938). The compromise gave the Yokohama Specie Bank claimants in *Abe* approximately half of the amounts sought in their complaint, together with an award for attorney's fees.[9] Not being parties to the *Abe* litigation (n. 7, *supra*), petitioners in the present case were not included in the settlement.

E. THE PRESENT ACTION

After the compromise settlement in *Abe*, the present petitioners asked for similar treatment of their claims. Being of the view that those claims were barred by the

[8] That case had been instituted by persons whose similar debt claims against the vested assets of the Sumitomo Bank, Ltd., had also been allowed by the Attorney General only at the post-war *yen* exchange rate.

[9] The Sumitomo claimants—the plaintiffs in *Aratani*—did not fare so well. Because their claims far exceeded the vested assets available to pay them, they received only 25 percent of their claims. See 228 F. Supp. at 708; 50 U.S.C. App. 34(d).

limitation period prescribed in Section 34(f), and that, by Section 39 of the Act, Congress had intended all moneys remaining in vested alien property accounts to be transferred to the War Claims Fund,[10] the Attorney General rejected petitioners' demand. Petitioners then commenced the present action in the United States District Court for the District of Columbia in May 1964 (two and one-half years after the period for seeking judicial review of the Attorney General's determination had expired) (R. 1). They claimed to be suing "on their own behalf and on behalf of all others similarly situated"—to wit, holders of *yen* certificates of deposit of the Yokohama Specie Bank whose claims had been dismissed as abandoned (R. 1, 3) and who had not filed suit within sixty days as required by Section 34(f)—although, in fact, two of the named petitioners had formally withdrawn their claims (App., *infra*, pp. 44–45). On March 31, 1965, the district court granted the Attorney General's motion to dismiss the actions "because * * * not commenced within the time set forth in Section 34(f) of the Trading with the Enemy Act" (R. 36). The court of appeals affirmed, one judge dissenting (R. 69, 89).

As they had in the district court, petitioners urged on appeal that the government was estopped to assert the statute of limitations defense. The court of ap-

[10] The War Claims Fund is the source from which the Foreign Claims Settlement Commission pays the claims of United States citizens who suffered loss or damage by reason by German or Japanese military operations in World War II. See 50 U.S.C. App. 2011–2012a.

peals expressed doubt that the doctrine of equitable estoppel applies to the United States so as to waive the express time limitation in the Trading with the Enemy Act, but found it unnecessary to decide that question. Noting that the Attorney General had taken "meticulous" and "painstaking" care to inform petitioners of his adverse actions on their debt claims, as well as of the avenue of judicial relief open to them (R. 77), the court concluded (R. 79):

> We do not believe that the factual record before us permits a conclusion that the appellee "by his representations or his conduct induced" the appellants to give appellee any advantage. This being so, the question of whether the doctrine of estoppel restated in *Glus* [*Glus* v. *Brooklyn Eastern Terminal*, 359 U.S. 231] is operative against the Government, or more specifically against this appellee, does not enter this case.

An application for rehearing *en banc* was denied, one judge again dissenting (R. 101–102).[11]

[11] In the same opinion, the court of appeals also affirmed the district court's dismissal of an action brought by Masaru Okamoto and others (No. 19,283, C.A.D.C.) whose claims had been disallowed by the Custodian on the ground that they were ineligible under Section 34(a) of the Trading with the Enemy Act because they had been interned as enemy aliens. 50 U.S.C. App. 34(a). Appellants in that case did not join in the petition for certiorari and are not before this Court.

We note here the special situation of one of the six claimants named in the petition for certiorari in this case, Mrs. Masae Kondo (R. 41). Unlike the other five petitioners, Mrs. Kondo did not receive the 1959 letter from the Attorney General which requested submission of the original certificates of deposit and

SUMMARY OF ARGUMENT

This alien-property suit was dismissed below as untimely, having been filed two and one-half years after the expiration of the period of limitations prescribed by the Trading with the Enemy Act for judicial review of the Attorney General's disallowance of petitioners' claims. Petitioners argue that the government, by its conduct, is estopped to plead the statute of limitations as a defense. The court of appeals held this contention to be factually unsupported, and consequently had no occasion to reach the broader question whether the principle of equitable estoppel is applicable at all in proceedings of this kind against

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advised that otherwise the claim would be considered abandoned. That letter had inadvertently been misaddressed by the Alien Property Office. The "Final Schedule" and accompanying letter advising that her claim had been disallowed and of her right to seek judicial review within sixty days were correctly sent by registered mail to the address Mrs. Kondo had designated. Although those papers were not returned by the Post Office as undeliverable, Mrs. Kondo informs us that in fact she did not receive that notice either, apparently because in the interim she had moved without informing the Alien Property Office of her change of address. Mrs. Kondo states that, had she received any notice, she would have submitted her certificates to the Custodian and timely prosecuted her claim, just as she had done with her similar debt claim against the vested assets of another Japanese Bank (R. 50–51). It seems apparent that, but for the unfortunate confusion as to Mrs. Kondo's correct mailing address, she would have been included in the *Abe* settlement. As we noted in our brief in opposition to the petition for certiorari (p. 12, n. 5), the Attorney General has accordingly advised counsel for Mrs. Kondo that he stands ready to make payment to her on the basis of the *Abe* settlement, as she seeks in her complaint (R. 43).

the government. On either ground, we submit that the judgment below should be affirmed.

I

The facts do not show inequitable or unconscionable conduct on the part of the government. As promptly as was feasible in the circumstances, the Attorney General advised petitioners of the amount of their claims that he would allow. He notified them—repeatedly—of their right to obtain judicial review if dissatisfied with his determination. All of the named petitioners were represented by counsel to whom the notices were also sent. Petitioners inexplicably did not sue. Other claimants similarly situated did sue and, after extended litigation, obtained a compromise settlement that was more favorable to them than the Attorney General's original determination had been. It was then that the present petitioners belatedly brought suit. The foregoing, we shall show, constitute the totality of relevant circumstances—and they are far removed from any that have ever been thought to give rise to an estoppel.

II

Even if the circumstances were such as to warrant invocation of the doctrine of equitable estoppel in a private suit, we believe that the doctrine has no application to suits against the government under the Trading with the Enemy Act. Since the statute of limitations in a suit against the government is jurisdictional, it may not be waived by government officials unless Congress so authorizes. The Trading with the Enemy Act contains no such authorization. All indi-

cations, indeed, are that Congress did not intend that the period of limitations provided in the Act might be extended in the manner petitioners suggest.

III

Finally, there is, in our view, no merit to the contention that enforcement of the 60-day statute of limitations in the circumstances of this case would violate the Fifth Amendment's guarantee against confiscation. First, petitioners had no property rights that were extinguished; they were merely creditors of the bank whose assets were seized. Secondly, the 60-day period—a normal limitation for suits, like the present one, to upset an administrative determination—provided adequate opportunity for petitioners to protect their legal rights.

ARGUMENT

Petitioners were required by Section 34(f) of the Trading with the Enemy Act, 50 U.S.C. App. 34(f), to file any suit for the satisfaction of their debt claims within 60 days of the Attorney General's final determination. That determination was made—no later than October 1961—when he mailed the final notice of debt claims allowed together with the schedule of proposed payments to the Yokohama Specie Bank claimants (R. 35). The time for suit thus expired no later than December 1961. Petitioners did not sue, however, until May 19, 1964—two and one-half years later (R. 1). The issue is whether the suit was properly dismissed as time-barred.

I

THERE IS NO FACTUAL BASIS FOR THE ARGUMENT THAT THE GOVERNMENT, BY ITS CONDUCT, SHOULD IN EQUITY AND GOOD CONSCIENCE BE ESTOPPED TO PLEAD THE STATUTE OF LIMITATIONS IN DEFENSE TO PETITIONERS' SUIT

In *Glus* v. *Brooklyn Eastern Terminal*, 359 U.S. 231, 234, Mr. Justice Black, speaking for the Court, described the doctrine of "equitable estoppel" as follows:

> The principle is that where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage. * * *

We believe that the doctrine is inapplicable to suits against the United States (Point II, *infra*, p. 29). However, this Court need not, in our view, reach that question here. As held by the court of appeals, the claim of estoppel is unsupported by the record (R. 79).

A. Petitioners' argument that the circumstances give rise to an estoppel may be broken down into several distinct assertions: (1) that they were discouraged from timely prosecution of their claims by the Attorney General's adoption of the post-war *yen*-dollar exchange ratio; (2) that they were entitled to the benefit of the settlement negotiated by those claimants who did sue; (3) that the government represented to them that they would be treated as well as

claimants who sought judicial review; (4) that they were not clearly apprised of their right to seek such review; (5) that what notice they did receive was additionally inadequate because of language difficulties stemming from petitioners' foreign background; and (6) that pursuit of their judicial remedies was improperly deterred by the Attorney General's request that claimants submit their original certificates of deposit (or, in lieu thereof, a notarized explanation). None of these points, we submit, is meritorious on this record.

1. The Attorney General's decision to pay the debt claims on the basis of the post-war exchange ratio was made in good faith. As to this, we believe there is no dispute. The decision had a substantial basis in law—as attested by its acceptance by the district court and the court of appeals in the *Aratani* litigation (see Statement, *supra,* pp. 13–14). There is no evidence whatever that it was intended to discourage timely suit by disappointed claimants. One might indeed have anticipated the opposite result—that the size of the award would act as a spur to litigation aimed at upsetting it. Many claimants similarly situated to these petitioners did, of course, bring timely suit.

It is not as if the Attorney General's decision was communicated to the claimants on a "take it or leave it" basis without clear indication that they could, if dissatisfied, seek judicial redress. As we demonstrate *infra,* pp. 24–26, petitioners and their counsel were repeatedly and adequately apprised that they

could obtain judicial review of the Attorney General's determination.

2. Petitioners were not entitled to the benefit of the settlement reached—years after they had apparently abandoned their claims—with the claimants who did sue. No principle requires the government, upon concluding a compromise settlement with one litigant or group of litigants, to offer the same settlement to persons with similar claims who failed to prosecute them. Not only would the settlement of lawsuits be deterred by such a theory—under which the act of settlement revives claims that have become time-barred—but it erroneously equates the equities of one who does press his claim in litigation with one who does not. An individual who assumes the cost and burden of litigation is not, we submit, unfairly advantaged because, as the result of his efforts, he obtains a better settlement than an individual who declines to pursue his legal remedies.[12] And we stress that the settlement with the *Abe* and *Aratani* plaintiffs (which occurred after this Court granted certiorari in *Aratani*) was a genuine compromise motivated by uncertainty as to the outcome of the litigation. The Attorney General (who had prevailed in both courts below) did not repudiate his legal position that payment at the post-war rate was required under the decisions of this Court and the claimants did not insist upon payment in the full amount that they had prayed for in their complaints.

[12] See *Sunal* v. *Large*, 332 U.S. 174; *Ackermann* v. *United States*, 340 U.S. 193; *Annat* v. *Beard*, 277 F. 2d 554 (C.A. 5), certiorari denied, 364 U.S. 908.

3. No representation was made or implied that debt claimants who did not seek judicial review of the Attorney General's determination within the 60-day period allowed by Section 34(f) would be treated the same as those who diligently pursued their claims. In 1958 and 1959—before the statute of limitations even began to run—the Attorney General informed all debt claimants with claims based on *yen* deposit certificates of his decision to honor such claims at the lower post-war exchange rate (R. 6). He explicitly advised petitioners and their counsel (R. 7, 9):

> Under the procedures set forth in section 34(f) of the Trading with the Enemy Act, as amended (50 U.S.C. App. 34(f)), it is necessary that all of the approximately 9000 claims filed against the Yokohama Specie Bank, Ltd. be reviewed and a schedule issued showing the proposed payments before any payments can be made. Within sixty days after the issuance of the schedule, any aggrieved claimant may file in the District Court of the United States for the District of Columbia a complaint for review of such schedule, naming the Attorney General as defendant. If no complaint for review is filed, payments will be made in accordance with the schedule.

Far from suggesting that claimants might benefit by forbearing from suit, the Attorney General thus made plain that failure to sue would result in final payment at the post-war *yen* rate only. And he repeated the point in his letter accompanying the final schedule of claims, mailed in 1961 to all who had not formally cancelled their claims. The letter stated (R. 34): "If no such complaint for review is filed within the sixty-

day period, payments to claimants will be made by this Office as specified in the Final Schedule."

4. There is no substance, we believe, to the suggestion that the Attorney General concealed or failed clearly to inform petitioners of their right to seek judicial review. We stress that on three occasions the Attorney General took pains to inform petitioners—and their counsel—of the statutory provision for appeal of his determination. The first was the 1958 letter to petitioners and their counsel, quoted in the text above, which, as the court below noted, correctly outlined the substance of his decision and the remedies open to claimants under the statute (R. 77). Again, in dismissing petitioners' claims for failure to comply with his request to submit their original deposit certificates, the Attorney General included in the dismissal notice—mailed to claimants and their counsel—the specific information that "any further proceedings are governed by section 34(f) of the Trading with the Enemy Act" (R. 33)—the section that provides for judicial review. The Attorney General gave petitioners notice of their rights a third time when he mailed his "final schedule" of allowed claims and proposed payments. It was the mailing of that schedule in 1961 (as the letter itself stated) which actually triggered the running of the 60-day limitations period under Section 34(f). And in that letter he stated (R. 34):

> This Schedule is being served by registered mail on all claimants listed therein, as well as on claimants whose claims have been dismissed and disallowed. Pursuant to Section 34(f) of the Trading with the Enemy Act, as amended,

> any claimant considering himself aggrieved by this Final Schedule may, within sixty (60) days from the date of the mailing of the Schedule, file in the United States District Court for the District of Columbia a complaint for review of this Schedule, naming the Attorney General as defendant. * * * If no such complaint for review is filed within the sixty-day period, payments to claimants will be made by this Office as specified in the Final Schedule.

5. Petitioners may not be heard to answer that, while the Attorney General's repeated notifications of the judicial remedy provided by the Act may have been clear to individuals literate in the English language, many of the recipients of his communications—by reason of their foreign background and difficulty with the English language—were unable to understand them. Dispositive of this contention is the absence in this record of any claim that the named petitioners themselves—who at all times relevant here were advised by able counsel of their own selection, to whom copies of the Attorney General's communications were sent (*e.g.*, R. 9)—could not comprehend the Attorney General's letters.[13] This Court early held that an "estoppel *in pais* does not operate in favor of everybody. It operates only in favor of a person who has been misled to his injury, and he only can set it up." *Ketchum* v. *Duncan*, 96 U.S. 659, 666.

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[13] Not only did petitioners' counsel receive copies of the critical communications; for aught the record reveals, none of the named petitioners had any language difficulty at all. We point out that not one of the affidavits relied upon by petitioners was supplied by persons actually named in the complaint and therefore before this Court.

The Court, in that case, held that one aware of the true nature of a situation could not invoke the defense of estoppel although it might have been available to others not personally before the Court. Nor are petitioners helped by framing their suit as a "class" action. Clearly, they are not proper representatives of a class of claimants to which they—by virtue both of having been represented throughout by counsel and of never having shown that they themselves have any language problem—do not belong. F.R. Civ. P. 23(a). In addition, we point out that an individual with a language problem who receives an official communication from the government can readily obtain the assistance of others more familiar with the language.

6. Nor does an estoppel arise from the circumstance that the Attorney General requested claimants to submit their original *yen* certificates of deposit prior to payment on their claims. That request in no way prejudiced petitioners' ability to file timely suit under Section 34(f). The final schedule and the accompanying letter calling attention to the recipient's right to judicial review were mailed to everyone who had not formally withdrawn his claim—whether or not he had submitted a certificate and whether or not his claim had been allowed (R. 34). It is not suggested that those petitioners who did not file notices of cancellation (App., *infra*, pp. 44–45) did not receive the schedules. They were, therefore, in as good a position to file suit in 1961, when the schedules were mailed to them as they were in 1964, when they actually sued.

In addition, it was appropriate for the Attorney General to request the original *yen* deposit certificates—or, in lieu thereof, a notarized statement explaining why they could not be submitted and stating "that you have not received payments or renewed certificates" (R. 8)—before he honored debt claims based on the certificates. Payments on the certificates were being made elsewhere (Statement, *supra*, p. 11). It was therefore proper to assume that the absence of an original certificate was *prima facie* indication that the owner had received payment from another source.

The circumstances of this case are far removed from those in which courts have invoked equitable estoppel. Comparison with the facts of the *Glus* decision, on which petitioners principally rely, is illuminating. The defendant in that case was an employer whose agents had misled the plaintiff employee to believe that he had seven years in which to bring suit under the Federal Employers' Liability Act. The employer was held estopped to plead the Act's three-year statute of limitations. In the present case, the Attorney General clearly did not mislead petitioners with respect to the applicable time limitation for seeking judicial review of his disallowance of their debt claims. He made no misrepresentations. He advised them truthfully that he would allow their debt claims only at the post-war exchange ratio and that they would have to sue, within the time provided in the Act, to obtain a greater restitution. This was of course perfectly consistent with his subsequent action in settling at a higher exchange ratio with those debt claimants *who did sue*. Petitioners were not, by the government's conduct, "lulled into a

false security" (359 U.S. at 233). There was no offense "against equity and good conscience" (*id.* at 234).

B. In weighing the equities, it is also appropriate to consider the consequences if petitioners' untimely claims are allowed. To begin with, such a recovery would reduce the amount available in the War Claims Fund to pay victims of World War II.[14] Secondly, it would foster inequality of treatment among *yen* deposit certificate holders. Petitioners do not claim to represent all of those with unsatisfied *yen* deposit claims against the Japanese banks. The Sumitomo bank claimants (see Statement, *supra*, p. 14, n. 8) who filed timely suits against the Attorney General received but a small fraction of their claims, because of the inadequacy of the vested assets of that bank (see 228 F. Supp. at 708). The Sumitomo claimants who—like the present petitioners—failed to bring suit at all can get nothing, because the vested assets of that bank have been exhausted (50 U.S.C. App. 34(d)). Petitioners do not even represent the holders of all *yen* deposit claims against the Yokohama Specie Bank who have not been paid. There is another group, of at least 1,500 claimants, who formally withdrew their claims in response to the Attorney General's 1958 letter (Pet. Br. 7). If the remaining assets of Japanese banks are to be reopened for

[14] See 50 U.S.C. App. 39 (b)–(d), and War Claims Act of 1948, 50 U.S.C. App. 2001, 2007, 2012, 2012a. It is precisely because the government here is in a position akin to that of a stakeholder (though, of course, the moneys are those of the United States, not of a third party) of a fund against which there are competing claims that it felt it was not free to pay claims time-barred under the statute in order to settle this lawsuit.

further distribution, fairness would seem to require that the interests of these persons also be considered. Only Congress is in a position to adjust the equities of all concerned. For this reason we agree with the court below (R. 83) that "the relief sought * * * lies solely in legislative hands."

II

THE GOVERNMENT CANNOT BE ESTOPPED TO PLEAD THE STATUTE OF LIMITATIONS IN A SUIT UNDER THE TRADING WITH THE ENEMY ACT

We have shown that the circumstances of this case are not such as to give rise to an estoppel under the *Glus* principle. It is likewise plain that they are insufficient to bring the case within the related teachings of *Burnett* v. *New York Central R. Co.*, 380 U.S. 424.[15] We contend alternatively that the principle of

[15] In *Burnett* plaintiff's timely FELA suit in a State court was dismissed for improper venue after the limitations period expired—the State law not providing for transfer to the proper forum in these circumstances. Plaintiff then refiled the action in the district court eight days later. After noting that plaintiff "did not sleep on his rights" and that proper venue was not a jurisdictional prerequisite to the entertainment of the action in the State court, this Court held that the FELA statute of limitations was tolled for the period during which the timely State suit was pending. In the present case petitioners were two and one-half years late in commencing suit, notwithstanding that they had been given accurate advance notice by the Attorney General of their right to judicial review, the proper forum, the applicable limitation period, and, in the case of the named petitioners before the Court, were represented by counsel who was similarly notified. The considerations which compelled the Court's conclusion that Burnett's action was timely would indicate that the present suit was properly dismissed as untimely.

those cases is inapplicable to suits against the government under the Trading with the Enemy Act.

The position of the United States is not akin to that of private defendants: it may not be sued at all unless Congress consents. Consequently, "the terms of this consent to be sued in any court define the court's jurisdiction to entertain the suit" (*United States* v. *Sherwood*, 312 U.S. 584, 586); and if Congress prescribes a specific period in which suit against the government must be brought, that limitation is jurisdictional and "must be strictly observed" (*Soriano* v. *United States*, 352 U.S. 270, 276). Since the parties to a suit cannot waive jurisdictional limitations, government officials cannot enlarge the statutory time within which suit must be brought, even if by their conduct they may have misled the other party to the suit.[16] *E.g.*, *Munro* v. *United States*, 303 U.S. 36, 41; *United States* v. *Michel*, 282 U.S. 656; *Finn* v. *United States*, 123 U.S. 227; *Pittman* v. *United States*, 341 F. 2d 739 (C.A. 9), certiorari denied, 382 U.S. 941; *Legerlotz* v. *Rogers*, 266 F. 2d 457 (C.A.D.C.), certiorari dismissed, 362 U.S. 938; *Anderegg* v. *United States*, 171 F. 2d 127, 128 (C.A. 4), certiorari denied, 336 U.S. 967; *Wallace* v. *United States*, 142 F. 2d 240

[16] Compare the settled principle that "the United States is neither bound by nor estopped by the act of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit." *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 409, and cases cited; *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380; *United States* v. *California*, 332 U.S. 19, 31, 40; *United States* v. *San Francisco*, 310 U.S. 16, 31-32; *Utah* v. *United States*, 284 U.S. 534, 545, 546.

(C.A. 2), certiorari denied, 323 U.S. 712; cf. *Automobile Club* v. *Commissioner*, 353 U.S. 180, 187.

This principle was firmly established when Congress enacted Section 34 of the Trading with the Enemy Act, which authorized suit against the government [17] but imposed a 60-day limitation upon its commencement. Congress presumably was aware that, save to the extent it authorized waiver or tolling of the limitations period in the Act, that period would be treated by the courts as jurisdictional [18]—and hence not to be enlarged by any conduct of the officials responsible for administering the Act. It provided no such exception to the time limitation; it granted no authority to the Attorney General or any other official to waive the limitation (see notes 16 and 18, *supra*). None, therefore, may be implied.[19] Accordingly,

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[17] It is not disputed that suits against the Attorney General under the Act, as successor to the Alien Property Custodian, are suits against the United States. *Banco Mexicano* v. *Deutsche Bank*, 263 U.S. 591, 602–603; *Codray* v. *Brownell*, 207 F. 2d 610 (C.A.D.C.), certiorari denied, 347 U.S. 903.

[18] See *Soriano* v. *United States*, 352 U.S. 270, 276; *Legerlotz* v. *Rogers*, 266 F. 2d 457 (C.A.D.C.), certiorari dismissed, 362 U.S. 938; *Brownell* v. *Nakashima*, 243 F. 2d 787, 792 (C.A. 9), certiorari denied, 355 U.S. 872; *Cisatlantic Corporation* v. *Brownell*, 131 F. Supp. 406, 407 (S.D.N.Y.), affirmed, 222 F. 2d 957 (C.A. 2). Thus, where Congress has desired to permit officials to waive statutes of limitations, it has done so expressly. See, *e.g.*, 26 U.S.C. 6532(a)(2).

[19] The principle that, in suits against the United States, the statute of limitations will not be tolled by implication was emphatically reaffirmed in *Soriano* v. *United States*, 352 U.S. 270. In that case, petitioner's suit against the United States under the Tucker Act was not brought within the period of limitations prescribed by the Act. Soriano asserted that he was precluded from bringing suit because of wartime hostilities.

since petitioners' suit was untimely under the Act (see p. 19, *supra*),[20] the court was without jurisdiction to grant relief.

Nor need we rest with an inference from legislative silence—plain as that inference is in the circumstances. Congress made its intention that the limitations period in the Trading with the Enemy Act was to be strictly observed unmistakable, by expressly providing in Section 34(i):

For this reason he contended, as petitioners do here, that the circumstances required the limitations period to be tolled even though Congress had not provided for such tolling. This Court held—in a decision which applies with equal force to petitioner's contentions in this alien-property litigation—that the Tucker Act limitations period prescribed by Congress could not be tolled by implication (352 U.S. at 275–276; emphasis added):

> To permit the application of the doctrine urged by petitioner would impose the tolling of the statute in every time-limit-consent Act passed by the Congress. For example, statutes permitting suits for tax refunds, tort actions, *alien property litigation*, patent cases, and other claims against the Government would all be affected. Strangely enough, Congress would be required to provide expressly in each statute that the period of limitation was not to be extended by war. But Congress was entitled to assume that the limitation period it prescribed meant just that period and no more. With this intent in mind, Congress has passed specific legislation each time it has seen fit to toll such statutes of limitations because of war. And this Court has long decided that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied. * * *

A similar issue—whether the statute of limitations in the Tucker Act is tolled by certain administrative proceedings—is involved in *Crown Coat Front Co., Inc.* v. *United States*, pending on writ of certiorari, No. 371, this Term. See Br. for United States, pp. 22–35; see, also, pp. 35–36, n. 26, *infra*.

[20] It was conceded at the outset of this litigation that petitioners were not within the class of claimants on whose behalf timely suits were filed (R. 3).

> The sole relief and remedy available to any person seeking satisfaction of a debt claim out of any property or interest which shall have been vested in or transferred to the Alien Property Custodian * * * or the proceeds thereof, shall be the relief and remedy provided in this section, and suits for the satisfaction of debt claims shall not be instituted, prosecuted, or further maintained except in conformity with this section * * *.

This provision gains added significance when it is noted that the Act provides for the tolling of limitations in specified circumstances[21] that are concededly not applicable here. The language of Section 34(i) quoted above indicates that these provisions were intended to be exclusive.

We derive additional support from the legislative history. The committee reports of both Houses stress that the reason for prescribing specific time limits in Section 34 was that 'litigation with respect to alien property matters should be brought to a close and the Government should not for all time be open to attack."[22] Indeed, with this in mind, the time for filing debt claims with the Custodian was deliberately re-

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[21] Section 34(a) of the Trading with the Enemy Act gives the Attorney General any defense to the payment of a debt claim that would have been available to the debtor himself, "except that the period from and after the beginning of the war shall not be included for the purpose of determining the application of any statute of limitations." 50 U.S.C. App. 34(a). Section 33 tolls the limitation for filing suit for the return of vested property during the pendency of certain other proceedings. 50 U.S.C. App. 33.

[22] S. Rep. No. 1839, 79th Cong., 2d Sess., p. 3; H. Rep. No. 2398, 79th Cong., 2d Sess., p. 9.

duced to two years from the four-year period originally proposed.[23] Nor did the adequacy of the period for seeking judicial review of the Custodian's rulings on such claims escape congressional notice. The initial bill would have allowed only 45 days to institute court proceedings.[24] When it was urged at the House committee hearings on the bill that three months would be a more reasonable limit,[25] Congress rejected the suggestion and enacted the present 60-day period. There is accordingly no support in the hearings or committee reports for petitioners' contention that it would further Congress' purposes to authorize their suits to be filed two and one-half years beyond Congress' deliberately chosen deadline.

The decisions cited by petitioners are manifestly inapposite. *Glus* and *Burnett*—on which petitioners principally rely—were not even suits against the government.[7] Therefore in neither did the Court have occasion to consider the jurisdictional considerations which preclude the invocation of estoppel in such suits. We point out that in *Soriano* v. *United States*, 352 U.S. 270 (*supra*, p. 31, n. 19), the Court had expressly rejected as precedent a decision holding that the statute of limitations was tolled in a suit against a private party, stating: "That case involved private citizens, not the Government. It has no applicability to claims against the sovereign." 352 U.S. at 275.

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[23] See Hearings before Subcommittee No. 1 of the Committee on the Judiciary of the House of Representatives on H.R. 5089, 79th Cong., 2d Sess., p. 45.

[24] *Id.*, pp. 46–47.

[25] *Id.*, pp. 78–79.

This precept applies squarely to *Glus* and *Burnett*. The other cases relied on by petitioners (Br. 27–28) are likewise wide of the mark.[26] The only pertinent decision under the Trading with the Enemy Act holds that a claim of equitable estoppel is unavailable.

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[26] *N.V. Philips, etc.* v. *Atomic Energy Commission*, 316 F. 2d 401 (C.A.D.C.), held only that the general limitation period in 28 U.S.C. 2401(a) for commencing civil actions against the United States in court did not govern the time within which an administrative claim for compensation had to be presented to the AEC. Similarly, *McWilliams* v. *United States*, 138 F. Supp. 863 (Ct. Cl.), dealt only with the time a cause of action against the government accrued; it discussed neither estoppel nor tolling. The question presented in *Borg-Warner Corp.* v. *United States*, 39–1 U.S.T.C. (CCH), ¶ 9292 (N.D. Ill.), affirmed, 108 F. 2d 424 (C.A. 7), was only "when does the limitation period begin to run?" (108 F. 2d at 426). *Exchange & Savings Bank of Berlin* v. *United States*, 226 F. Supp. 56 (D. Md.), and *Vestal* v. *Commissioner*, 152 F. 2d 132 (C.A. D.C.), deal with the situation—not present in the instant case—where Congress did expressly authorize the responsible official to waive statutes of limitations; and in light of *Automobile Club* v. *Commissioner*, 353 U.S. 180, 187 (see pp. 29–30, *supra*), those decisions are of doubtful authority.

The holding in *Northern Metal Co.* v. *United States*, 350 F. 2d 833 (C.A. 3), that the time in which to commence suit against the United States under the Tucker Act is tolled by the pendency of required administrative proceedings, is inconsistent with this Court's decision in *Soriano* v. *United States*, 352 U.S. 270, and the Second Circuit's decisions in *States Marine Corp. of Delaware* v. *United States*, 283 F. 2d 776, and *Crown Coat Front Co., Inc.* v. *United States*, 363 F. 2d 407, pending on writ of certiorari, No. 371, this Term. For the reasons stated in our brief in *Crown Coat Front*, we think that *Northern Metal Co.* was incorrectly decided. In any event, that case is of no assistance to petitioners here. All administrative proceedings in the instant case were completed before the statute of limitations in 50 U.S.C. App. 34(f) commenced to run.

Osbourne v. *United States*, 164 F. 2d 767 (C.A. 2), involved an action by a seaman for negligence under the Jones Act

Legerlotz v. *Rogers*, 266 F. 2d 457 (C.A. D.C.), certiorari dismissed, 362 U.S. 938.[27]

III

THE FIFTH AMENDMENT DOES NOT PRECLUDE APPLICATION OF THE STATUTE OF LIMITATIONS TO THE CIRCUMSTANCES OF THIS CASE

Petitioners assume that the Custodian's vesting of the Yokohama Specie Bank's assets as enemy property also constituted a taking of the property of the holders of the bank's *yen* certificates of deposit. They reason from this premise that such summary seizure violates

against his employer, American President Lines, and the United States, the owner of the ship. Without ruling as to whether the Suits in Admiralty Act or the Jones Act period of limitations was applicable, the Second Circuit held that the period of limitations was tolled by the seaman's imprisonment by the Japanese during World War II. In so doing, it ruled that the doctrine of *Hanger* v. *Abbott*, 73 U.S. 532, was controlling. 164 F. 2d at 768, 769. Insofar as the 1947 decision in *Osbourne* holds statutes of limitation for suits against the United States tolled by war, it is inconsistent with, and overruled by, *Soriano* v. *United States*, 352 U.S. 270, in which this Court expressly ruled that the doctrine of *Hanger* v. *Abbott* "has no applicability to claims against the sovereign." 352 U.S. at 275. And apparently for that reason this Court in *Burnett* v. *New York Central R. Co.*, 380 U.S. 424, cited *Osbourne* only for the proposition that "the FELA limitation provision" may be tolled by war (380 U.S. at 427, 429).

[27] Petitioners' contention (Br. 36–38) that timely suit by other claimants was in itself enough to toll the running of the statute of limitations in favor of all others who had similar claims against respondent but did not assert their rights is plainly unsound. Those who fail to seek timely review of adverse decisions derive no benefit from the successful appeals of those who do. *Sunal* v. *Large*, 332 U.S. 174; *Ackermann* v. *United States*, 340 U.S. 193; *Annat* v. *Beard*, 277 F. 2d 554 (C.A. 5), certiorari denied, 364 U.S. 908.

their Fifth Amendment rights to due process unless a fair opportunity for judicial review is subsequently provided, and that the 60-day period prescribed by Congress in which to seek review of the Attorney General's actions on debt claims is not adequate for that purpose. We disagree.

To begin with, the argument rests on a mistaken premise. The Custodian never seized or took petitioners' property. As holders of the Yokohama Specie Bank's *yen* certificates of deposits, petitioners' relationship with the bank was simply that of creditor and debtor. As this Court has stated, "an unsecured simple contract creditor has, in the absence of statute, no substantive right, legal or equitable, in or to the property of his debtor." *Pusey & Jones Co.* v. *Hanssen*, 261 U.S. 491, 497. Thus, in vesting the Yokohama Specie Bank's American assets as enemy property the Custodian did not seize any legal or equitable interest of the bank's creditors, and Congress was not required to make those vested assets available for relief of the contract claims against their former owners. *Sutherland* v. *Norris*, 24 F. 2d 414 (C.A. 3); *Kogler* v. *Miller*, 288 Fed. 806, 808 (C.A. 3).

At all events, petitioners had an adequate and fair opportunity to enforce their claims against the vested assets.[28] Each was warned by letters from the Attorney General in 1959 of the substance of his administrative determination (R. 6, 29). As noted earlier,

[28] We note, also, that Congress left open another avenue of relief. Section 34(i) of the Trading with the Enemy Act provides:

> Nothing contained in this section shall bar any person from the prosecution of any suit at law or in equity

these letters also advised petitioners of their right to judicial review and of the forum and time within which the Act required that such review be sought. They thus had had nearly two years in which to decide upon a course of action when, in 1961, respondent's final schedule was mailed and the 60-day limitation period commenced to run as prescribed in Section 34(f)."

Moreover, this Court has upheld—over similar objections based on due process grounds—the constitutionality of statutes limiting to 60 days the period within which to challenge an administrative decision. The leading case is *Yakus* v. *United States*, 321 U.S. 414. The Emergency Price Control Act of 1942 (56 Stat. 23, as amended by 56 Stat. 765) authorized the Price Administrator to set maximum commodity prices by regulation. Persons affected could challenge a regulation only by protest to the Price Administrator filed within 60 days after it was promulgated. The Act also provided criminal penalties for failure to comply with the price regulations. Yakus was convicted of violating the Act by selling beef above the prices set by the Administrator's regulations. He challenged that conviction on the ground, *inter alia*, that 60 days was not sufficient time within which

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against the original debtor or against any other person who may be liable for payment of any debt for which a claim might have been filed hereunder. [50 U.S.C. App. 34(i).]

The right of the creditors here (petitioners) to proceed against the original debtor is not an empty one. The successor of the debtor Yokohama Specie Bank is still solvent and in business.

"The adequacy of this notice is discussed in Point I of our argument, *supra*, at pp. 24–26.

to protest the administrative decision and that his conviction for failing to comply with the ceiling prices in such circumstances was therefore a denial of due process. The Court rejected that constitutional argument, noting "numerous instances" of comparable or shorter periods within which to challenge administrative regulations that had been sustained by the Court. See 321 U.S. at 435, and cases there cited. Since 60 days is a constitutionally adequate time to seek review of an administrative order in the context of a criminal conviction, we submit that the identical period prescribed in Section 34 for seeking review of the Attorney General's debt claim determination is, *a fortiori*, constitutionally adequate.

We emphasize that there is nothing unusual in the length of time for review prescribed in Section 34(f). A 60-day period is the usual time allowed by Congress for an appeal to the courts from the ruling of a federal administrative agency—and Section 34(f) itself provides that judicial review of the Attorney General's debt claim determinations shall be on the administrative record made before him.[30] *Reissner* v. *Rogers*, 276 F. 2d 506, 509 (C.A.D.C.), certiorari denied, 364 U.S. 816; *International Silk Guild* v. *Rogers*, 262 F. 2d 219, 224, n. 7 (C.A.D.C.). A 60-day period for filing a petition or complaint for review is prescribed by the Judicial Review Act of 1950, 5 U.S.C. 1031, 1034, with respect to the Federal Com-

[30] Section 34(f) gives the district court discretion to take additional evidence, but only "upon a showing that such evidence was offered to and excluded by the Custodian or could not reasonably have been adduced before him or was not available to him."

munications Commission, the Federal Maritime Administration, and certain orders of the Secretary of Agriculture. Similarly, petitions for review of orders of the Federal Trade Commission (15 U.S.C. 45(c)), the Securities and Exchange Commission (15 U.S.C. 78y), the Civil Aeronautics Board (49 U.S.C. 1486), the Federal Power Commission (16 U.S.C. 825*l*(b)), and the Secretary of Health, Education and Welfare under the Social Security Act (42 U.S.C. 405(g)), must be brought within 60 days of the final administrative action.[21] Sixty days is also the time in which to appeal to a court of appeals in a case in which the United States or an officer or agency is a party. F.R. Civ. P. 73(a). Congress did not act unfairly in applying this common rule to suits under the Trading with the Enemy Act.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JANUARY 1967.

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[21] See, also, 7 U.S.C. 608c(15)(B), limiting to twenty days the time within which to seek review of certain marketing orders promulgated by the Secretary of Agriculture.

APPENDIX

Retainer Agreement

I, hereby retain and employ A. L. Wirin and Fred Okrand, 257 South Spring Street, Los Angeles, California, and Marshall Ross, 510 South Spring Street, Los Angeles, California, and any other attorney or firm of attorneys they may associate in this matter to represent me in the matter of my claim as a depositor in the Yokohama Specie Bank, Ltd. based on Certificate No(s). 68729 issued by said bank. As a depositor receiving said certificate(s) known as a "Yen Certificate(s)" I have heretofore filed a claim with Department of Justice, Office of Alien Property, Washington, D.C., seeking payment of this debt to me out of properties formerly belonging to the above named bank and now vested in the United States Government.

I herewith empower and authorize said attorneys to do any and all things they may deem necessary to secure recovery for me of my claim. I agree to pay said attorneys for their services, an amount equal to ten (10%) per cent of the total recovery on my behalf, out of any moneys they may recover for me in this matter.

Dated this 19th day of October 1955.

[S] Ayako Honda,
Residing at 1576 Valota Rd.,
Redwood City, Calif.

[Similar form agreements retaining Messrs. Wirin and Okrand were filed with the Office of Alien Prop-

erty by each of the other named petitioners on the date noted:

Kanekichi Murakami	October 19, 1955
Kaneyo Sato	October 24, 1955
Tomi Tsugi	October 18, 1955
Geusuke Yoshida	October 19, 1955.]

[Source: Administrative record.]

Claim No. 52200

[Registered mail]

MAY 12, 1959.

AYAKO HONDA,
1576 Volota Road,
Redwood City, California.

Dear Sir: Enclosed is a copy of my Order dismissing the above-numbered debt claim.

Very truly yours,

[Signed] Paul V. Myron,
Deputy Director,
Office of Alien Property.

Enclosure
cc: Wirin, Rissman & Okrand
257 South Spring Street
Los Angeles 12, California

[Source: Record in the court of appeals. Similar letters, with copies to counsel, appear in the files of the other named petitioners.]

NOTICE OF CANCELLATION OF CLAIM

Claim No. 48000 [Post marked September 29, 1959]
Claimant Kaneyo Sato
Debtor: Yokohama Specie Bank, Ltd.

I hereby cancel the above claim filed with the Office of Alien Property, without prejudice to any rights which I may have to collect the funds in Japan.

[s] Kaneyo Sato, (*Claimant*).

[Source: Record in the court of appeals.]

Notice of Cancellation of Claim

Date, December 1, 1958.

Claim No. 17796
Claimant Gensuke Yoshida
Debtor Yokohama Specie Bank, Ltd.
(I hereby cancel the above claim.)

[s] Gensuke Yoshida.

[Source: Record in the court of appeals.]

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No. 164

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

AYAKO HONDA, ET AL., *Petitioners,*

v.

NICHOLAS DeB. KATZENBACH, ATTORNEY GENERAL OF THE UNITED STATES, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR PETITIONERS

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Crown Coat Front Co., Inc. v. *United States*, No. 371 ..... 3, 4
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 164

AYAKO HONDA, ET AL., *Petitioners,*

v.

NICHOLAS DeB. KATZENBACH, ATTORNEY GENERAL OF THE UNITED STATES, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR PETITIONERS

The Government's prolonged exercise in technicalities cannot obscure its total evasion of the issue of justice and equity; its Brief would be more appropriate to a suit by the Chase Manhattan Bank or the General Motors Corporation than to one by 4100 Japanese-Americans with small savings deposits and legal and language barriers as well. Not once in its Brief does the Department of Justice deny that the result it seeks from this Court is as manifestly unjust as petitioners have urged, and as both the dissenting and majority opinions below found it to be. In a case arising from summary Government taking, and bristling with constitutional issues, perhaps nothing more need be said than to note the Government's failure to deny the injustice which flows

from the divestiture of thousands of Japanese-American claimants—persons whose statutory debt claims the Government concedes to be valid unless now foreclosed by the expiration of the 60-day limitation period. To leave no point in doubt, however, we file this response to correct some serious errors of fact and law in the Government's Brief.

1. *Misrepresentation.* The Government's principal contention is that it was not guilty of any deliberate misrepresentation to petitioners, and that accordingly no estoppel or tolling of limitations may be invoked against it. But while fraud or misrepresentation are compelling grounds for equitable estoppel or tolling of limitations, they are not indispensable. Federal courts (See Pet. Br. p. 28) have rejected so narrow a test, and have instead invoked equitable suspension of limitations even in the absence of misrepresentation where compelled by fundamental considerations of justice. This Court, too, has so ruled. In *Burnett* v. *New York Central R. Co.*, 380 U.S. 424, 428-429, the Court suspended limitations for reasons entirely apart from the defendant's conduct, where plaintiff's mistake of venue had caused the expiration of the statutory period. And in *Stearns Co.* v. *United States*, 291 U.S. 54, 59-61, this Court *specifically applied limitations-estoppel on behalf of the Federal Government against a taxpayer even in the absence of any misrepresentation.* It did so because injustice would otherwise have resulted since the Government had failed to sue within the statutory limitations period while engaged at the taxpayer's own request in administrative re-investigation of the tax assessment.

In the *Stearns* case the Government (Supplemental Brief for the United States, pp. 2-3) represented to this Court—directly contrary to its present assertion—that misrepre-

sentation is *unnecessary* for judicial invocation of equitable estoppel of limitations:

> "The petitioner attacks the Government's defense of equitable estoppel as being ill-founded under established rules prescribing the requisite elements of such a defense. The Government invokes what this Court has described as 'the vital principle' of equitable estoppel . . . *Dickerson* v. *Colgrove*, 100 U.S. 578, 580. ***Misrepresentation of existing fact is not necessary in order to make the principle applicable.*** No such element was required by this Court in the *Colgrove case*, where the plaintiff was held to be estopped to assert title to land because his predecessor in title had disavowed the intention of asserting his claims against others then in possession" (emphasis supplied).

We cannot believe that now, when the shoe is on the other foot, the Government can reverse direction and persuade this Court that limitations-estoppel necessarily requires fraud or misrepresentation. Against so narrow a standard nothing speaks as persuasively as the Government's eloquent silence on this Court's *Stearns* ruling; the Court will look in vain for any reference to *Stearns* in the Government's Brief in the present case or in *Crown Coat*.[1]

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[1] We cannot refrain from noting that the Circuit Court's ruling presently under review in *Crown Coat Front Co.*, No. 371, appears to fly directly in the face of *Stearns*. The limitations suspension which the Circuit Court denied to the Crown Coat Company during the pendency of administrative agency proceedings, is precisely the suspension which this Court granted the Government in *Stearns* during the pendency of the administrative proceedings there. The conflict, we submit, can be justified only on the basis of the Government's sovereign immunity argument, which we find unlikely in *Crown Coat* and which, for constitutional reasons, is in any event unavailable to the Government in the present case (see *infra*, p. 10).

2. *The equities.* Apart from the Government's redundant insistence that misrepresentation is the *sine qua non* for equitable suspension of limitations, it offers little response to petitioners' arguments. Instead of refutation, the Government adds weight to each of the four independent grounds upon which we urge the appropriateness of limitations-suspension in the present case:

i. Petitioners' first ground for limitations-suspension (Br. pp. 33-36) is that they relied on the Government's initial offer of restitution at 2% and now seek recovery on the basis of its change of position in 1964, after this Court's grant of review in *Aratani*. We find only confirmation of this point in the Government's Brief. Thus, the Government concedes (Br. pp. 14-15) that in 1964 after the agreed settlement in *Abe* "the present petitioners asked for similar treatment of their claims" which request "the Attorney General rejected". And in the circumstances of this administrative denial by the Attorney General, the Government's affirmation in the pending *Crown Coat* case (No. 371, October Term, 1966, p. 14) of the general principle that limitation runs only from the time of administrative denial of a statutory claim is applicable here:

> "An action for a statutory refund arises only after there has been a demand by the plaintiff and a refusal of that demand that may be characterized as a breach of duty (*e.g., United States* v. *Taylor*, 104 U.S. 216, 221-222); a disbursing officer's action for relief from liability for lost funds arises only after accounting officers have refused to credit his accounts with the amount in dispute (*e.g., United States v. Smith*, 105 U.S. 620; *United States* v. *Clark*, 96 U.S. 37, 43-44). Compare p. 10, n. 4, *supra*. In such cases until administrative action is taken there is no breach of duty by government

officials and, consequently, no basis for a damages claim."

ii. Petitioners' second ground for limitations-suspension (Br. pp. 36-38) is that between 1961 and 1964 they reasonably awaited the outcome of the *Aratani-Abe* litigation, and filed this suit before expiration of that litigation after the Government refused them the equal treatment they had reasonably anticipated. We find no answer to this point in the Government's Brief. Instead the Government attacks petitioners' emphasis as an aggravating circumstance upon the fact that the vast majority of the 4,100 claimants before this Court had no counsel to advise them of any technical distinction between the claims litigated in *Abe* and their own claims. Actually, the Government does not anywhere deny the documented showing (see Pet. Br. pp. 33, 37) of the absence of counsel. Instead, it urges (Br. pp. 25-26) that the few "named petitioners" at bar *were* represented before the OAP by "counsel of their own selection", and accordingly cannot be heard to assert that the great majority of the 4,100 claimants in this class suit had no counsel.

This Government contention would be of little significance at best, for petitioners' contention is only fortified by, rather than dependent upon, their lack of counsel. But actually the Government's facts concerning the named plaintiffs are absolutely wrong, resulting from a gross oversight. In enumerating the named petitioners in *Honda* (Resp. Br. pp. 11-12) the Government omits the four claimants whose affidavits (R. 10-17) attested language difficulty, lack of counsel, etc., and states that they are not persons "named in the complaint and therefore before this Court" (Resp. Br. p. 25, n. 13). In so stating the Government has overlooked the fact that following the initial filing of the *Honda* complaint, and long before the District Court acted on the Government's

motion to dismiss, these four claimants *were* made individual *named* plaintiffs in the action. On January 12, 1965, the four affiants were formally listed "as additional named plaintiffs" in the *Honda* suit. See *infra, Appendix*, p. 16. Pursuant to a request by counsel for petitioners on January 31, 1967, the Department of Justice has searched its records and confirmed that, unlike the other named petitioners in the *Honda* case, three of the four affiants joined as named plaintiffs on January 12, 1965—Kyuji Hozaki, Jiro Kai, and Shigeo Kumashiro—have had *no* counsel of record before the OAP in the 20 years that their claims have been pending. Since these claimants without counsel are among the "named plaintiffs" in this action, this Court *may* properly consider as an aggravating circumstance the verified fact that the great majority of the 4,100 class action petitioners before the Court had no counsel in the years when they expected that the ultimate resolution of the *Aratani-Abe* litigation would be equally extended to their own claims by the Government.[2]

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[2] Apart from the mistaken claim that all of the named plaintiffs had counsel, the Government makes no answer to the absence-of-counsel equity in the present case. Nor could the Government be heard to suggest that petitioners' failure to obtain counsel should somehow be charged against them. For example, it could not be seriously entertained that petitioner Jiro Kai, who had an OAP claim for a $20 deposit account (R. 12), should have sought counsel and instituted separate legal action when the *Abe* case was already pending. Even for experienced attorneys it was unexpected that the Government would decide to pay hundreds of Yokohama Bank claimants at the pre-war exchange rate while declining to grant the same standard of payment to thousands of other Yokohama Bank claimants though the funds are on hand for that purpose. And to a petitioner such as Mr. Jiro Kai, an 84-year old non-English speaking Japanese immigrant without legal counsel (R. 12) whose $20 account was taken in 1941 but upon which the Government has yet to offer him more than a 30¢ return, its conduct is literally beyond possibility of intelligible explanation.

The fact that the *Abe* claimants, with larger deposits, did retain counsel to pursue their rights made petitioners at bar all the more certain that their rights would be equally protected if the *Abe* litigation should establish that *depositors generally were entitled to the payment of their claims on the basis of a more favorable exchange rate than that offered by the*

iii. Petitioners' third ground for limitations-suspension (Br. pp. 39-43) is the Government's involvement in their "delay" in filing suit by its own 20 years of delay, confusion and discouraging representations. Apart from the Government's insistence that OAP was guilty of no deliberate misrepresentation to petitioners, the Government makes little response to this point.[3] It does suggest (Br. p. 25) that the circumstance that most of the petitioners were burdened in understanding the Government's communications by lack of literacy and command of English is not before the Court because the affiants on this score were not "named in the complaint". The Government's oversight of the January 12, 1965 addition of the affiants as named plaintiffs has been discussed above and needs no repetition here. It is, however, worthy of note that the Government never actually denies that its representation to petitioners in 1958, that no more than a 2% return was due them under the law was an *erroneous* representation. Not only did the Government settle the *Abe* litigation by paying 100% of principal at the Pearl Harbor Day rate to those claimants, it now informs this Court (Br. p. 16, n. 11) that in at least one new case—that of Mrs. Kondo—it is "ready to

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Government. This is obviously what Mr. Kai had in mind when he said: "I saw in the Japanese newspaper that a court suit was or would be filed seeking to obtain for the yen claimants the proper amount for their claims. I believed, therefore, I would be protected. With the small amount of my claim, I do not see how I could go to court myself . . ." (R. 12).

[3] About all the Government says in defense of its 20-year delay is its *ipse dixit* that it acted "as promptly as was feasible in the circumstances . . ." (Br. p. 18). But to a claimant whose savings deposit evaporated on Pearl Harbor Day, 17 years was hardly a "prompt" OAP determination that he was entitled to only 2% and 20 years was hardly a "prompt" time within which to start the running of the 60-day limitation period. Certainly, a Congress which had in 1946 been assured by the OAP of "all possible dispatch" (Pet. Br. p. 42, n. 15) and which then created a 60-day limitation period on this basis, could hardly have expected inexorable application of that 60-day limitation after another 15 years of Government delay.

make payment" on the *Abe* basis to one who was not a party to that case.[4] It seems clear, therefore, that the Government now concedes the error of its 1958 representation to petitioners that no more than 2% was due them as a matter of law. That error, of course, was the "misrepresentation" which has led to the tragic sequence of events involved in this case.

iv. Petitioners' fourth ground for suspension (Br. pp. 43-45) is that sheer injustice results if the Government may abuse limitations to bar recovery by claimants whose statutory eligibility for payment it has long conceded. Not only does the Government fail to respond to this contention, it once again concedes that petitioners are entitled to payment unless the 60-day limitations period bars them. The Government explains (Br. pp. 14-15) that, when petitioners asked in 1964 for similar treatment to that accorded the

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[4] The Government's offer to Mrs. Kondo (made *after* the petition for certiorari was filed) to pay her 100% of principal on her deposit account, in the same manner as was accorded to the *Abe* claimants, dispels the Government's suggestion that the *Abe* settlement was merely some form of negotiated "compromise". The Government's initial 1958 offer was based on the representation (R. 6) that the Government had no authority to recognize other than the post-war exchange rate in liquidating the depositors' claims. The later *Abe* settlement was in fact a recognition that the post-war conversion ratio was *not* the proper measure for payment of yen deposit claims under the statute; the settlement, *for 50 times the post-war rate*, was a change of position not a mere compromise of dollars. The Government, after all, is essentially a trustee of the vested assets for payment of validated debt claims and cannot accord disparate treatment to similarly situated claimants (see Pet. Br. p. 37, n. 13). Indeed, the Government appears to concede that petitioners *are* entitled to the same payment formula as their fellow-claimants in *Abe* if their suit is not barred by limitations. In reciting the basis of the Attorney General's refusal in 1964 to afford petitioners equal treatment (Resp. Br. pp. 14-15), only the limitation period is cited as the reason for the Attorney General's rejection of their claim, and no pretense is made that absent the limitation bar the Government could simply decline to petitioners the payment it granted the *Abe* claimants. The grounds which constrained the Government to reverse its original view that the post-war conversion ratio was applicable to yen-deposit debt claims are set forth in the petition for certiorari in the *Aratani* case and require no elaboration here.

Abe claimants, the Attorney General rejected their demand *"being of the view that those claims were barred by the limitation period prescribed in Section 34(f) . . ."* We take this to be a representation that the only ground for refusal to grant petitioners the same treatment as the *Abe* claimants was the 60-day limitations bar, and that in all other respects the Government continues to deem them entitled to recover.[5]

It is a surprising contention that a Government agency instructed to pay valid debt claims from vested assets under the Trading With the Enemy Act should refuse to do so *on no substantative* ground, but simply because, if the holders of the claims should thereafter sue, the Government might successfully interpose the procedural objection of limitations. The judicially-created doctrine of novation has long served to bar a defendant from pleading limitations to avoid a liability which he has recognized anew after the initial period has run. The Government's statement to this Court that its reason for refusing to honor petitioners'

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[5] The Government's additional reference to the fact that "by Section 39 of the Act, Congress had intended all moneys remaining in vested alien property accounts to be transferred to the War Claims Fund . . ." (Resp. Br. 15) avails it nothing. To begin with, any War Claims Fund argument is wholly circular since Congress never intended that Fund to be enlarged from vested assets *except* to the extent that moneys were left over after all Trading With the Enemy Act claims were paid. If petitioners' claims are not barred by the statute of limitations, the War Claims Fund has nothing to do with them. Moreover, the War Claims Fund suggestion is a manifest afterthought. To our knowledge, the Government has never before suggested that a legitimate debt claimant should have his rights defeated because Congress provided for alternative use of vested assets after all legitimate debt claimants had been paid. When petitioners urged that the rule of the *Abe* settlement be applied to them, it was not the War Claims Fund but *administrative inconvenience* which was cited to them. See Pet. for Cert. p. 9, n. 4. That the Yokohama Bank assets would go to the War Claims Fund if petitioners' equities should be rejected is of no more significance than the fact that, in the absence of Section 39, these assets would have gone into the general funds of the Treasury.

1964 request for payment was simply the 60-day limitation period, may alone warrant this Court's application of the doctrine of novation. Moreover, this is an action to require the honoring of claims by the Government pursuant to an Act of the Congress, wherein more than merely competing private interests are involved. Where the Government is acting in a fiduciary capacity the public interest is certainly preserved by achievement of a just result. The grossest disregard for the Congress and the rights of citizens inheres in the Government's representation that the ground upon which in 1964 it refused to honor 4,100 statutory claims was its anticipation of the limitations bar rather than any doubt as to their validity.

3. *Sovereign Immunity.* Apparently recognizing the slimness of its equities before this Court, the Government's Brief regresses to the argument that sovereign immunity bars a limitations suspension under this statute no matter how compelling may be the considerations of justice and equity which call for tolling or estoppel. But petitioners have demonstrated (Br. pp. 19-23) that since this case arises from summary Government appropriation of private property, every presumption should be indulged *against* the inference that sovereign immunity precludes equitable suspension of the Act's limitation period. As we anticipated, the Government in its Brief (p. 37) makes the "quibbling distinction" that in vesting the Yokohama Bank's assets it "did not seize any legal or equitable interest of the bank's creditors . . ." To our showing that for Fifth Amendment purposes this is a distinction without a difference, the Government chooses to make no answer. Moreover, in arguing that Congress was not required to permit any opportunity of suit by debt claimants, fair or unfair, the Government also chooses to disregard the expressed Congressional view when enacting this statute (see Pet. Br.,

p. 21)—that fair return to debt claimants was required precisely *because* "but for the vesting of their debtors' property, they would presumably have been able to pursue ordinary remedies against the debtors."

The Government's Brief is silent on the critical fact that by seizing and vesting private funds, the Government precluded pursuit of the "ordinary remedy" of certificate conversion from domestic assets of the Yokohama Bank and thus effected a "taking" of 98% of petitioners' assets lost by the wartime decline in the value of the yen. We have emphasized to this Court that following Pearl Harbor the Government's seizure and vesting of the Yokohama Bank funds froze and made unavailable the assets from which petitioners might have obtained payment on their deposit certificates. The Government's Brief (p. 6) admits that, from the seizure and vesting of the Yokohama Bank's funds to petitioners' renewed opportunity after the war to cash their deposits in Japan, "in the intervening years, the dollar value of the Japanese *yen* had declined greatly"—to less than 2% of its former value. As the devaluation loss of petitioners' property rights was caused by the action of the United States Government alone, it is the Government alone rather than the bank in Japan to whom petitioners must look, and under the Fifth Amendment have a right to look, for just compensation.

On these facts it is clear that there has been a "taking" of petitioners' property. The Government concedes that the private funds from which petitioners might have redeemed their deposit certificates were seized and frozen by the Government after Pearl Harbor Day, and that during the period when they remained so frozen petitioners' yen deposit certificates dropped to a fraction of their former value. It is simply incredible to suggest that under the Fifth Amendment petitioners were nevertheless owed

no fair opportunity of redress from the vested private assets of their debtor, and that the Government can now interpose sovereign immunity to prevent equitable tolling or estoppel in a suit not for compensation from the Treasury but for a return from expropriated private assets. Indeed, the Government cites not a single line from the statute or its legislative history to support its contention that sovereign immunity then existed which the Congress was waiving in the statute. On the contrary, the silence of Congress on the issue of sovereign immunity underlines the view that it deemed the Alien Property Custodian merely a trustee charged with equitable distribution rather than acting in the capacity of the sovereign.

4. *Just Compensation.* Proceeding from its premise that sovereign immunity may be interposed against petitioners' claims, the Government urges (Brief pp. 29-36) that the Trading With the Enemy Act's 60-day limitations period may not be estopped or tolled because the Government is the defendant in the action. Since the sovereign immunity premise falls before the Fifth Amendment, the Government's argument must fail. The cases chiefly relied on by the Government for a strict construction of limitations arose in genuine sovereign immunity situations and simply have no bearing here.[6] Far from strict construction to preserve

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[6] Of this Court's rulings cited by the Government only *Soriano* arose from a Government "taking" situation, and there the relationship between sovereign immunity and the Just Compensation Clause was not adjudicated by this Court. In *Soriano* this Court emphasized that after the Government passed upon the petitioner's claim "within less than three months", he nevertheless delayed his suit for another two years without apparent cause for delay. In *Soriano* the Government acted in three months while here it delayed for twenty years; there the limitations period was six years while here it is sixty days; there no reason for delay was apparent while here petitioners were misled by the Government's confusing and erroneous representations, reasonably believed themselves protected by the pending *Abe* litigation, and sued immediately when the Government arbitrarily

sovereign immunity, the present case with its context of summary Government taking requires the broadest and fairest reading of the claimants-rights provisions of the statute. In this respect it is notable that the Government chooses to disregard the documented showing (Pet. Br. pp. 24-25) that in the Trading With the Enemy Act the Congress itself recognized that practical sense and fairness may require limitations tolling. Instead of addressing itself to this legislative evidence, the Government's Brief (p. 31) argues that courts may never estop or toll limitations under this statute because the Congress "granted no authority to the Attorney General or any other official to waive the limitation." Of course this approach, which would handcuff the judicial power of equitable tolling and estoppel, is utterly at odds with this Court's decisions in *Glus*, *Burnett* and *Stearns*, where far longer statutes of limitation were tolled in the absence of express Congressional authority. In any event, the argument that "in suits against the United States, the statute of limitations will not be tolled by implication" (Resp. Br. p. 31, n. 19), whatever may be its validity elsewhere, simply has no meaning in this suit in the nature of an action for a return of property seized by the Government, which the Just Compensation and Due Process Clause safeguard from application of sovereign immunity.[7]

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denied them equal treatment in 1964. Moreover, apart from these vital differences, the *Soriano* rationale that Congress was "entitled to assume that the limitation period it prescribed meant just that period and no more", cannot survive the rationale and holdings in *Glus* and *Burnett*.

[7] Our Brief (pp. 26-30) also urges that judicial authorities generally make the Government amenable to estoppel and tolling of limitations once Congress has authorized suit against the sovereign. In a footnote (p. 35, n. 26) the Government would distinguish these rulings on a variety of grounds too ephemeral to require detailed response. But we do desire to emphasize again that the sovereign immunity argument—which these judicial rulings reject in their application of estoppel to the Government—lacks credence when it is presented in cases where Congress *has* in fact waived any immunity which might have existed. *Munis* and this Court's

5. *Payment.* In a last gasp effort, the Government abandons the question of limitations-suspension and suggests instead that practical considerations should preclude honoring petitioners' claims unless Congress first acts to give them relief. The Government suggests that there are 1500 other claimants who "withdrew their claims in response to the Attorney General's 1958 letter" whose interests should "also be considered" (Resp. Br. pp. 28-29). It is noteworthy that the Government has never before given a nod to these 1500 claimants, but now suddenly interposes them to impair the rights of the 4,100 claimants who are before the Court. If, however, the Government is not shedding crocodile tears, but is at long last genuinely concerned to pay the 1500 Yokohama Bank depositors who were led by its 1958 letter into sending in withdrawal cards, the matter is easily resolved. As the Government itself points out (Br. p. 12), two of the named plaintiffs in the *Honda* suit are among those 1500 claimants who sent in notice of cancellation cards in 1958. If this Court rejects the Government's limitations plea and reinstates the suit, petitioners naturally stand ready—pursuant to their consistent position that similarly situated claimants should have been similarly treated—to include in a District Court settlement similar to that in *Abe* the 1500 "withdrawal card" claimants concerning whom the Government now expresses concern. While the remaining vested assets of the Yokohama Bank are, we believe, sufficient to include with the 4,100 litigants these 1500 additional claimants, should the fund prove inadequate for full distribution, then the normal proration formula of the statute would, of course, apply to require equal diminution of every claimant's recovery.

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other F.T.C.A. rulings demonstrate that it will not narrow the Congressional grant of jurisdiction to sue the Government by importing special limitations on its behalf which other litigants do not enjoy. See also *Seaman* v. *Mumford*, 118 App. D. C. 282, 335 F. 2d 704.

Neither in these 1500 claimants with withdrawal cards, nor elsewhere, can the Government find a scintilla of equity or justice for its position.

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The Government concedes that petitioners are eligible debt claimants. Nowhere has it denied the injustice of barring petitioners from the statutory recovery due them. Nor does it conjure up the slightest prejudice resulting from the fact that in 1961 they awaited the outcome of the *Aratani-Abe* litigation and sued in 1964 when the Government denied their request for equal treatment. Instead of seeking "to redress as far as possible the regrettable injuries suffered by Japanese-American citizens during World War II" (Br. of State of Cal., p. 1), the Government would heap a new and further injury upon those who have already suffered far too much.

With injustice manifest and prejudice absent it is submitted that the ruling below should be reversed and the *Honda* action reinstated to afford petitioners the same alien property disbursement given to their fellow-claimants in the *Abe* litigation.

Respectfully submitted,

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APPENDIX

Filed Jan. 12, 1965

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1179-64

AYAKO HONDA et al, *Plaintiffs*,

v.

NICHOLAS deB. KATZENBACH, Acting Attorney General of the United States, *Defendant*.

PRAECIPE

The Clerk of the Court will please enter the following as additional named plaintiffs in the caption of the above-entitled case:

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cc: Armand DuBois—Justice Dept.
Fred Okrand, Esq.—via air mail.

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SUPREME COURT OF THE UNITED STATES

No. 164.—October Term, 1966.

Ayako Honda et al., Petitioners, v. Ramsey Clark, Attorney General of the United States. | On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[April 10, 1967.]

Mr. Justice Harlan delivered the opinion of the Court.

Petitioners are 4,100 United States citizens of Japanese descent seeking to recover funds vested under the Trading With the Enemy Act, 50 U. S. C. App. § 1 *et seq.*. The District Court dismissed their suit against the Attorney General [1] as barred by limitations, and the Court of Appeals affirmed by a divided vote. 356 F. 2d 351. We granted certiorari because of the importance and unusual character of the questions involved, affecting the proper application of this wartime statute. 385 U. S. 917.

Both as the case was treated by the lower courts and as it was largely argued here, the limitations issue has been thought to turn on whether the Government is estopped from asserting the 60-day time bar provided for actions of this kind by § 34 (f) of the Trading With the Enemy Act. We conclude, however, that "estoppel" is not the controlling issue, but that for reasons discussed in this opinion the period of limitations was tolled, requiring reversal of the judgment below.

I.

Upon the outbreak of hostilities with Japan, the United States, on December 7, 1941, acting under the

[1] This suit was originally filed against Robert F. Kennedy, then Attorney General. Nicholas deB. Katzenbach was substituted as statutory defendant in the District Court, and Ramsey Clark, the present Attorney General, succeeded him as respondent here by operation of law. Sup. Ct. Rule 48 (3).

Trading With the Enemy Act, seized the American assets of businesses owned by Japanese nationals, among such property being the assets of the Yokohama Specie Bank, Ltd. The assets of the bank were liquidated, and in 1943 were vested in the Alien Property Custodian, see *Paramount Pictures, Inc.* v. *Sparling*, 93 Cal. App. 2d 768, 770–771, 209 P. 2d 968, 969–970. Petitioners were among the approximately 7,500 depositors of the bank holding "yen certicates," [2] who filed timely claims in 1946 under § 34 of the Act seeking recovery of their deposits.

Section 34 of the Act was enacted in 1946 as a legislative response to this Court's decision in *Markham* v. *Cabell*, 326 U. S. 404, which allowed nonenemy creditors of former owners of vested property to bring suit under a World War I statute,[3] and recover directly out of vested assets. The Alien Property Custodian feared that allowance of such suits might lead to inequitable results, in that creditors who brought suit immediately might exhaust the assets at the expense of other, equally valid claims. The Custodian urged, and the Congress agreed, that an approach on the lines of the Bankruptcy Act was a fairer method of distributing such assets.[4] See H. R.

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[2] The certificates expressed their value in terms of yen, and bore the following statement, in both Japanese and English:

"This is to certify that the sum of yen ——— has been submitted to our Head Office, Yokohama, to be placed in Fixed Deposit there in your name at — percent. per annum for — months, maturing ———, subject to the conditions on the back hereof.

"Both principal and interest are payable, when due, at our aforesaid Head Office, Yokohama, upon surrender of this Certificate, properly endorsed and/or sealed."

[3] Section 9 (a) of the Trading With the Enemy Act, 50 U. S. C. App. § 9 (a).

[4] Section 34 (a) limits allowable debt claims only to "those of citizens of the United States or of the Philippine Islands; those of corporations organized under the laws of the United States or any State, Territory, or possession thereof, or the District of Columbia or the Philippine Islands; those of other natural persons who are

Rep. No. 2398, 79th Cong., 2d Sess., 10, 14 (1946); S. Rep. No. 1839, 79th Cong., 2d Sess., 4, 8 (1946). As in bankruptcy law, the new Act required the filing of a debt claim with the Custodian within a specified period, § 34 (b).

Approximately 7,500 yen certificate holders, including petitioners, immediately complied with this provision and submitted photostatic copies of their respective certificates. In the course of processing the claims pursuant to § 34 (f) a question arose as to the redemption value of the certificates both for depositors of the Yokohama Specie Bank and for those of another bank, the Sumitomo Bank, holding similar certificates. An administrative determination was sought in a proceeding brought in the name of one of the Yokohama Bank depositors, Kunio Abe, Claim No. 55507. Abe, acting for all yen certificate holders, took the view that since these deposits had been made in American dollars, and the certificates were allegedly redeemable in dollars at any time upon demand at American branches of the bank, they should be treated as dollar debts at the amount of their value when seized in 1941, at a rate of about 4.3 yen to the dollar. The Attorney General,[5] however, characterized the debts as yen debts, and following the rule of *Deutsche Bank* v. *Humphrey*, 272 U. S. 517, and *Zimmermann* v. *Sutherland*, 274 U. S. 253, held that the proper measure of recovery would be at the postwar conversion rate of 361.55 yen to the dollar, or less than 2% of the prewar rate. It is noteworthy that throughout this period the Yokohama Bank's successor in Japan, the Bank of Tokyo,

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and have been since the beginning of the war residents of the United States and who have not during the war been interned or paroled pursuant to the Alien Enemy Act; and those acquired by the Custodian."

[5] The Attorney General assumed the duties of the Custodian in 1946 by Executive Order No. 9788, 11 Fed. Reg. 11981.

Ltd., was willing to redeem these certificates at the postwar rate. Petitioners, at any time, could therefore have received from the Japanese bank the amount the Government asserted would eventually be obtained from the vested assets.

At the conclusion of the administrative process, in 1958, the Chief of the Claims Section wrote to each of the depositors who had filed a claim, including petitioners, advising that "The Director of this Office decided on November 13, 1957, *In the Matter of Kunio Abe, et al.*, Claim No. 55507, Docket No. 55 D 72, which decision the Attorney General has declined to review, that yen certificates of deposit issued by the Yokohama Specie Bank, Ltd. . . . are obligations payable in yen in Japan . . . ," and therefore that the postwar rate of 361.55 yen to the dollar would be used in redeeming certificates from the vested assets. Claimants were told to submit their original certificates within 45 days. However, the letter continued, "Payment of your claim . . . will not be made immediately." The letter informed the claimant that a full schedule of claimants would be made, § 34 (f), and that after its issuance aggrieved certificate holders might file suit in the United States District Court for the District of Columbia for judicial review. "Under the circumstances," the letter continued, "you may wish to utilize the funds in Japan rather than await settlement by this office. If this is done, the Notice of Claim filed with this Office should be canceled by signing and mailing the enclosed Notice of Cancellation of Claim card."

Petitioners characterize this letter as "confusing" and "insulting." We think the opprobrium which is sought to be fastened on the letter is undeserved and consider it more accurate and fairer to say that although its instructions were complex, the letter was written in a manner designed reasonably to apprise a layman of the choices before him. However, on the particular facts of

this case and given the empirical evidence available, it is quite understandable that of the 7,500 initial claimants, only 1,817 responded affirmatively by sending in their certificates, and less than 1,600 canceled their claims and sought immediate recovery in Japan. The remainder, a majority of all who had claims, petitioners in this case, did nothing.

The reasons for their inaction are quite apparent, and, it can reasonably be argued, should have been so to the Government: the letter indicated that despite 12 years of waiting after the original submission of their claims, supported by copies of their certificates, they could expect to receive less than 2% of their basic deposits measured in dollar terms, and that even this amount would not be forthcoming immediately, but only after issuance of a schedule (an additional interval, it turned out, of three years) plus possible judicial review. Claimants would clearly be better off getting repayment immediately from the Japanese bank itself. This recourse, suggested by the letter itself, was at the same time understandably advantageous to the Government as well: American citizens would obtain relief but from a foreign source, thus freeing more of the vested assets for distribution to remaining claimants. It is thus understandable that the Government did nothing to ascertain why a majority of the 7,500 claimants had responded in no way to its letter.

In affidavits submitted to the District Court, and not contradicted on the motion to dismiss the complaint, various other reasons were asserted for the failure of these petitioners to respond. Petitioner Jiro Kai asserted:

> "I did receive a letter from the Office of Alien Property offering me about 30¢ for my claim. I think I recall being asked to send in my original certificate by registered mail to receive this amount. For me to have done this would have cost more

than I was being offered.[6] I had heard from others that many more persons had claims similar to mine and I understood that they were all being processed together. I saw in the Japanese newspaper that a court suit was or would be filed seeking to obtain for the yen claimants the proper amount for their claims. I believed, therefore, I would be protected."

Other affidavits gave similar reasons. These are summarized best in an affidavit of Mr. Katsuma Mukaeda, president of the Japanese Chamber of Commerce of Southern California:

"Many of the Yokohama Specie Bank yen deposit certificate holders were old people who could not read English and could not understand the communications they received from the Office of Alien Property; many of them had to rely upon other persons who themselves were not able to understand the letters; most of the claimants had never talked to a lawyer about their cases and there was a general feeling in the community that all of the claims were going to be treated alike, both the Sumitomo Bank claim-

[6] Counsel for petitioners have supplied us with the following information as to the range in amounts of the claims involved in this litigation: "Of the 1,120 *Honda* claimants who have . . . retained [our associated California counsel] . . . to the present date, the highest is for 120,000 yen—about $30,000 at the *Abe* ratio [or about $332 at the Government's original rate]—and the lowest claim is for 50 yen, or about $12 [about 14¢ at the lower rate]. Among all 4,100 petitioners the largest debt claimant of which we are aware chose other counsel, and his claim was for 246,000 yen (about $60,000) [about $680 at the lower rate] . . . .

"The average claim among the 1,120 *retainer* claimants in *Honda* is for about $2,000 [at the *Abe* rate], and the mean considerably lower; the average among all 4,100 petitioners is necessarily more modest still, because it includes the 2,980 claimants who have not even sought representation by counsel in this suit, presumably because of the very small amounts of their claims . . . ."

ants and the Yokohama Specie Bank claimants; there was knowledge in the community that a law suit had been filed in Washington and it was understood and believed that the outcome of that law suit would determine how much money the claimants received and that it would apply to all claimants not just some; most of the claimants had had experience with or had heard about the Japanese Evacuation Claims program (50 U. S. C. Appx. 1981–1987)[1] and many of them knew generally that under that program, deadlines had been extended and even that the law itself had been changed to include persons who originally were not eligible, to be eligible for repayment of some of their losses due to the Japanese evacuation program, and that persons who previously had been denied payment, later were paid; . . . since the original certificates of deposit were the claimants' only direct evidence of their claim, many of the claimants were reluctant to part with this evidence, especially at a time when the Government was recognizing their claims at less than 2% of their face value, to say nothing of accumulated interest over the years; moreover, many of them felt that to send in their certificates at that time would be taken as agreeing to accept this very small sum in full settlement and they did not want to do that; there were others whose claims were so

[1] This legislation, enacted in 1948, authorizes the Attorney General to make awards in amounts not to exceed $100,000 "on any claim by a person of Japanese ancestry against the United States arising on or after December 7, 1941, . . . that is . . . a reasonable and natural consequence of the evacuation or exclusion of such person by the appropriate military commander from a military area in Arizona, California, Oregon, or Washington; or from the Territory of Alaska, or the Territory of Hawaii, under authority of Executive Order . . . ." 50 U. S. C. App. § 1981.

small that to send in the originals at the figure the Government was offering would net them no return or a very small amount; as individuals, even those claimants who did not have very small claims could not afford to hire an individual lawyer in Washington or to file their own suit but had to rely on what was being done generally and many of them believed that in the end their Government would not try to keep their money but would return it."

The claims of these 4,100 claimants were dismissed when they did not respond within the 45-day administrative limit, pursuant to 8 CFR § 502.25 (g), 21 Fed. Reg. 1582.[8] Petitioners were notified that their claims were disallowed as abandoned, and told that further proceedings were governed by § 34 (f), the provision requiring a final schedule of claimants and providing for judicial review. In May 1961 a final schedule was prepared and sent to all claimants, including petitioners. Petitioners' claims were not included on the schedule, but they were informed that "Pursuant to Section 34 (f) of the Trading With the Enemy Act, as amended, any claimant considering himself aggrieved by this Final Schedule may, within sixty (60) days from the date of the mailing of the Schedule, file in the United States District Court for the District of Columbia a complaint for review of this Schedule . . . ."

[8] The regulation provides: "A claim shall be deemed abandoned when after request to do so the claimant has not furnished relevant information in support of his claim, or where by virtue of his failure to respond to inquiries regarding the claim it appears that he does not wish to pursue it further." Neither in his motion to dismiss the complaint in the District Court, nor on review in the Court of Appeals and in this Court, has the Attorney General advanced the argument that failure to comply with this administrative regulation is by itself an independent reason for dismissing this suit. It suffices to say here that such an argument would be open to attack on lines similar to those we hold require tolling the statute of limitations.

Such a suit was brought to challenge the proper rate of exchange. It was brought by Mr. Kunio Abe, the same person who had challenged the administrative ruling and whose case was cited by the Government in its letters to petitioners as dispositive of their cases. *Abe* v. *Kennedy*, C. A. No. 2529–61, D. D. C., was held in abeyance in the District Court pending a determination of the identical issue raised in relation to yen certificates issued by the Sumitomo Bank. The District Court upheld the Attorney General's determination, and the Court of Appeals affirmed, *Aratani* v. *Kennedy*, 115 U. S. App. 97, 317 F. 2d 161, modified, 323 F. 2d 427. After this Court granted certiorari in *Aratani*, 375 U. S. 877, the Attorney General entered into a compromise settlement with the plaintiffs in *Aratani* and *Abe*, in the latter case approximately at the prewar rate without interest.[9] Petitioners here were not included in the class represented by *Abe*, for his complaint was framed to represent only the class of those claimants listed on the schedule rather than all outstanding claimants. Petitioners therefore filed this suit upon final disposition of the *Abe* litigation, and long before the dismissal of certiorari in *Aratani*, asking for similar treatment.[10] The Attorney General denied their claims because petitioners were not included in the class represented in the *Abe* suit, and because they had not filed their suit within 60 days after mailing of the schedule as required by § 34 (f).

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[9] The claimants in *Aratani* recovered considerably less than those in *Abe* because the amounts of their claims exceeded the vested assets of the Sumitomo bank. 228 F. Supp. 706, 708.

[10] The District Court approved the settlements in both *Aratani* and *Abe* on March 18, 1964, 228 F. Supp. 706, and entered its final order on May 18, 1964. The present suit was filed May 19, 1964. The writ of certiorari in *Aratani* was dismissed on March 9, 1965, 380 U. S. 938, upon stipulation of counsel that the case had been settled.

II.

Quite apart from any question of governmental estoppel respecting assertion of the statute of limitations, a contention that is sought to be predicated on the foregoing train of events and circumstances, we consider that the limitations period was in any event tolled during the pendency of the *Abe* litigation, and that petitioners' right to bring their suit was not foreclosed. An analysis of the statutory scheme as devised by Congress persuades us, in the context of this factual setting, that this is the result most consistent with the legislative purpose of this Act.

The statutory system embodied in § 34 was intended to provide a method for the fair and equitable distribution of vested enemy assets to American residents. The basic model for the statute was the Federal Bankruptcy Act, a concept revealed in the legislative record by expressions of the Custodian and of those members of Congress principally responsible for the legislation.[11] The 60-day limi-

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[11] At the committee hearings on this section, the following dialogue occurred between the Chairman, Congressman Celler of New York, and the Custodian, Mr. Markham:

"Mr. MARKHAM. . . . We propose that the law be changed so that the man could file his claim, but he would be paid on a ratable basis, if there is not enough money for everybody, and that we should have a marshaling of assets and a marshaling of debts, so that everybody would be treated alike and would not depend upon the time when they brought the suit or the order in which the suits were brought.

"Mr. CELLER. But you want to be sure that you don't get into a situation where one creditor can fritter away all the assets of an enterprise, and you want to apply them under the principle now applied in the Bankruptcy Act, give each creditor an equitable share in the assets?

"Mr MARKHAM. That is the way I want it to be done. That is what I want to do." Hearings before Subcommittee No. 1 of the

tation on suits was designed to further this end—to aid claimants by expediting a final distribution—and not primarily as a shield for the Government.

The Bankruptcy Act, the pattern for this legislation, presents a compelling analogy, pointing the way to the decision which we make in this case. Section 57n, 11 U. S. C. § 93 (n), requires notification of claims within six months after the first date set for the first meeting of creditors. Those who fail to file timely claims do not, however, lose all their rights; rather after all duly allowed and properly filed claims have been paid in full, "claims not filed within the time hereinabove prescribed may nevertheless be filed within such time as the court may fix or for cause shown extend, and, if duly proved, shall be allowed against any surplus remaining in such case."

It is true that this equitable principle of the Bankruptcy Act was specifically authorizd by a 1938 amendment which was "designed to remedy the inequity of returning property to the bankrupt as long as there are creditors, however tardy, whose claims have not been satisfied even in part." 3 Collier, Bankruptcy, ¶ 57.33, at p. 398. But it is noteworthy that bankruptcy courts in the exercise of their general equity power had already reached this result long before the principle was enacted into law. As one *nisi prius* bankruptcy court stated in *In re Lenox*, 2 F. 2d 92, in 1924, "This [the statute of limitations] is a provision for the benefit of creditors, not

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House Committee on the Judiciary on H. R. 5089, 79th Cong., 2d Sess., 17 (1946). See also, *id.*, at 7, 11–13, 113–114.

Congressman Celler used the same reference when he introduced the bill to the House: "The bill before us provides that the Alien Property Custodian takes the property and sells it and divides the proceeds equitably among all creditors as pari passu, in bankruptcy." 92 Cong. Rec. 10217 (1946). And see H. R. Rep. No. 2398, 79th Cong., 2d Sess., 10, 14 (1946); S. Rep. No. 1839, 79th Cong., 2d Sess., 4, 8 (1946).

for the benefit of the bankrupt . . . . In the present case, the provisions of the Bankruptcy Act have been complied with, and those who complied with all its provisions have been paid in full. But the fact remains that the petitioner who had reduced his claim to judgment, the existence and validity of which the bankrupt recognized in his schedules and does not now deny, has received nothing. A fund remains in the hands of the trustee." The equitable solution, the court held, was to allow the claim, even though untimely. In *Williams* v. *Rice*, 30 F. 2d 814, an estate, presumably without assets, was reopened when new assets were discovered. The question was again whether creditors who had not filed timely claims should be allowed to prove their claims. Noting that the time limitation "is intended primarily to require creditors to prove their claims promptly, in order that the estate may be closed without undue delay," *id.*, at 815, the Court of Appeals for the Fifth Circuit held that in the absence of negligent failure to file, claimants in such a case could file after the time limitation. See also *In re Pierson*, 174 F. 160, where the court allowed the reopening of the estate and the filing of claims past the statutory period when new assets were discovered. But see *In re Silk*, 55 F. 2d 917, reaching the opposite result.

Another, though less precise, analogy in the bankruptcy area can be drawn from *Nassau Works* v. *Brightwood Co.*, 265 U. S. 269. The issue there was whether a creditor whose claim was not proved within the statutory period established for creditors in bankruptcy could nevertheless participate in a composition in bankruptcy. Mr. Justice Brandeis, writing for a unanimous Court, analyzed the statute in terms of its purpose and the various interests involved. From the viewpoint of the other creditors, he found, "neither the amount which a creditor receives, nor the time when he receives it,

can be affected by the amount of others' claims, or by the time of proof, or by their failure to prove . . . . Nor can the time of proof of claims, as distinguished from their allowance, be of legitimate interest to the bankrupt . . . . No reason is suggested why Congress should have wished to bar creditors from participation in the benefits of a composition merely because their claims were not proved within a year of the adjudication. Failure to prove within the year does not harm the bankrupt. Why should he gain thereby? And why should the creditor be penalized by a total loss of his claim?" 265 U. S., at 272–273.

These factors can be applied to the present case with equal force. What purpose does the strict 60-day limitation serve, except as a method of expediting the distribution of vested assets to creditors? But no other creditors are here objecting, for none exist: they have all compromised their claims and yet a surplus remains in the account. The Government itself has no real interest in this fund, for it neither comes out of the common weal nor will any surplus inure to the Treasury. The Attorney General is a mere stakeholder, a custodian in the true sense of the word.[12] The only persons who might eventually benefit from the surplus are those general beneficiaries of the War Claimants Fund into which any surplus is deposited. But the 60-day rule can hardly

[12] Under the War Claims Act of 1948, undistributed assets of enemy property are transferred to a War Claims Fund for distribution to United States citizens who suffered losses caused by enemy military operations during World War II. 50 U. S. C. App. §§ 39, 2011–2012. That Act also declares that no vested property be returned to their former German or Japanese owners as had been the case with some assets after World War I. § 39 (a). See H. R. Rep. No. 976, 80th Cong., 1st Sess., 2–3 (1947); H. R. Rep. No. 2439, 80th Cong., 2d Sess. (1948); S. Rep. No. 1742, 80th Cong., 2d Sess. (1948).

be deemed a device for augmenting this general fund at the expense of recognized creditors, especially in the face of repeated and uncontested expressions of congressional intent to facilitate and expand the rights of American creditors having an interest in these assets.[13]

III.

The foregoing considerations are especially persuasive here when the reason for petitioners' delay in bringing suit is recalled. It was generally known in the Japanese community that a class suit, the *Abe* case, had been filed in the United States District Court for the District of Columbia. The complaint in that suit outlined the history of the controversy over the proper rate of exchange and it specifically noted that this question was "[t]he sole issue on this complaint for review . . . ." An examination of the complaint, on file at the District Court but presumably not readily available to petitioners who lived on the West Coast, reveals that the plaintiffs included in the class action were defined as those listed on the final schedule rather than all those who filed valid claims. But from a practical standpoint, this definition, which legally excluded these petitioners, made no differentiation between the total group of certificate holders in any material respect. The legal issue raised in the complaint dealt only with the exchange rate; the administrative record filed with the District Court was that of the Abe

[13] See references cited in note 11, *supra*. There is nothing in the legislative history of the 1946 Act indicating that Congress had the interests of those who were in effect "remainder beneficiaries" in mind when imposing the procedures of § 34. It is further noteworthy that in 1953 the Congress refused to enact legislation, supported by the Government, that would have had the effect of wiping out entirely debt claims payable in foreign currency, the Yokohama Bank certificates being the largest group of such debts. See S. Rep. No. 616, 83d Cong., 1st Sess. (1953); 99 Cong. Rec. 7408–7409 (1953).

claim which did apply—at the administrative level—to petitioners; the named plaintiff was also Kunio Abe whose case was cited by the Government as dispositive of petitioners' claims; no action was in any event taken on the complaint which was held in suspense pending determination of the same legal issue in the *Aratani* case and then dismissed upon settlement with the *Abe* suit claimants. Since petitioners filed their claim immediately upon settlement of the *Abe* case, there can be no claim that the course of action they took in any way interfered with the speed or manner in which this litigation was conducted.

The only arguable difference it might have made had petitioners filed their action immediately upon publication of the schedule is that the Government's willingness to settle the case might have been dampened because the larger number of plaintiffs would have made settlement more costly to the total fund. Upon examination, however, even this possibility should be discounted when it is recalled that these are not in any real sense government funds, but rather vested assets of an enemy debtor which will be distributed to another class of war victims if petitioners' claims are barred. The Government has no interest in the fund except to enforce the primary congressional mandate that bona fide creditors recover their due. Since the amount in the fund adequately covers a full settlement with all these claimants at the *Abe* rate, exhausting the surplus should not have played a part in the Government's decision to settle with the *Abe* claimants.

For these reasons we think the statutory purpose is best served by invoking the equitable doctrine of tolling to preserve petitioners' action in which they seek payment on the same basis as that accorded the claimants in *Abe*.

IV.

In light of these circumstances we find the Attorney General's arguments unpersuasive. He argues primarily that the doctrine of estoppel does not apply in this case to prevent assertion of the statute of limitations. We do not reach the estoppel issue, because we hold that the statutory scheme itself requires tolling the limitation period during the pendency of the *Abe* litigation. In this respect, the Government contends that because this suit is, at least formally, one against the sovereign, see *Banco Mexicano* v. *Deutsche Bank*, 263 U. S. 591, the statute of limitations may not be tolled without express congressional consent. It is well settled, of course, that the Government is ordinarily immune from suit, and that it may define the conditions under which it will permit such actions. *E. g.*, *Kendall* v. *United States*, 107 U. S. 123; *United States* v. *Sherwood*, 312 U. S. 584. It is also true that in many cases this Court has read procedural rules embodied in statutes waiving immunity strictly, with an eye to effectuating a restrictive legislative purpose when Congress relinquishes sovereign immunity. *E. g.*, *Kendall* v. *United States*, *supra*; *United States* v. *Sherwood*, *supra*; *Soriano* v. *United States*, 352 U. S. 270; compare *Crown Coat Front Co.* v. *United States*, — U. S. —.

This case is, however, wholly different from those cases on which the Government primarily relies, where the public treasury was directly affected. Here Congress established a method for returning seized enemy assets to United States creditors, assets that were never contemplated as finding their way permanently into the public fisc. As the House and Senate Reports on this statute declare, "The Custodian has emphasized to the committee that he is anxious to satisfy the proper claims of creditors and the committee concurs in the view that there exists

a strong moral obligation to satisfy them inasmuch as, but for the vesting of their debtors' property, they would presumably have been able to pursue ordinary remedies against the debtors." H. R. Rep. No. 2398, 79th Cong., 2d Sess., 10 (1946); S. Rep. No. 1839, 79th Cong., 2d Sess., 3–4 (1946). We consider it much more consistent with the overall congressional purpose to apply a traditional equitable tolling principle, aptly suited to the particular facts of this case and nowhere eschewed by Congress, to preserve petitioners' cause of action. *Burnett* v. *New York Central R. Co.*, 380 U. S. 424; cf. *Midstate Horticultural Co.* v. *Pennsylvania R. Co.*, 320 U. S. 356, 360.

The judgment of the Court of Appeals upholding the dismissal of this action is therefore reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE CLARK took no part in the decision of this case.